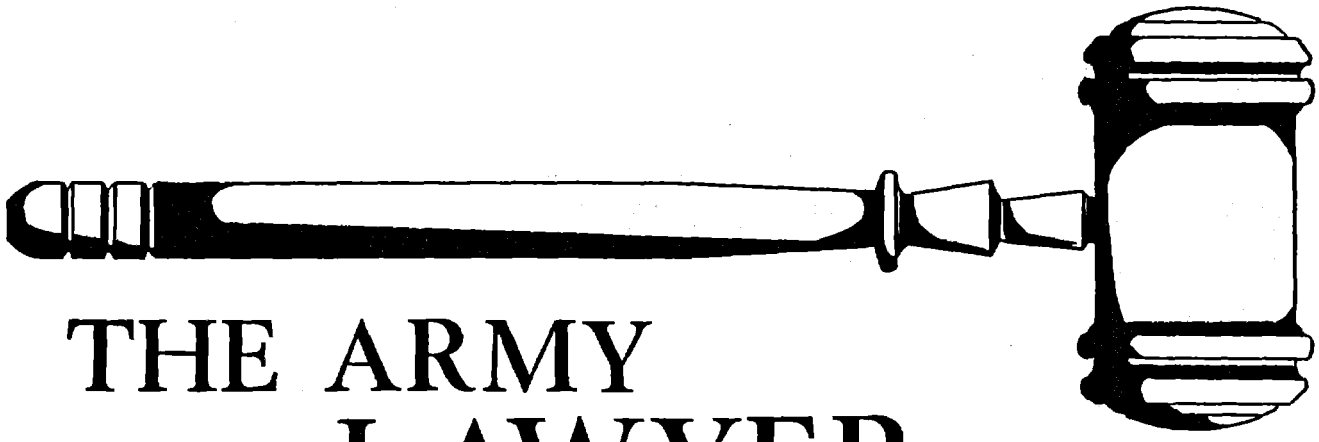

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Headquarters, Department of the Army

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Table of Contents

The Court of Military Appeals and the Military Justice Act of 1983: An Incremental Step Towards Article III Status?

Captain James P. Pottorff
OSJA, 1st Inf Div (Mech), Ft. Riley, KS

On December 6, 1983, President Reagan signed into law the Military Justice Act of 1983.[1] This Act, which went into effect on August 1, 1984, for the first time makes possible direct review of decisions of the United States Court of Military Appeals (CMA) by the United States Supreme Court. The decision to place CMA under the Supreme Court for review purposes is unprecedented in American military judicial history.[2] While the change is signifi-

[1]Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) (codified as amended in scattered sections of 10 U.S.C. and 28 U.S.C.), *reprinted in* The Army Lawyer, Jan. 1984, at 38.

[2]Until the creation in 1950 of the U.S. Court of Military Appeals in the enactment of the Uniform Code of Military Justice (UCMJ), direct appellate review of courts-martial by a civilian court of any kind was not possible. *See generally* Uniform Code of Military Justice Act of 1950, Pub. L. No. 506, 64 Stat. 108 (190) (codified as amended at 10 U.S.C. §§ 801-940 (1982)). Congress left no doubt that this court was to be separate and distinct from the Department of Defense. Legislative reports noted that CMA was included in the UCMJ "for the purpose of administration only." *See* S. Rep. No. 486, 81st Cong., 2d Sess. 2 (1950). The reports, however, reflect that no serious consideration was given to

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZX 25 October 1984

SUBJECT: Suspension Pending An Allegation Affecting Fitness -- Policy Letter 84-3

STAFF AND COMMAND JUDGE ADVOCATES

1. In exercise of statutory and regulatory responsibilities, The Judge Advocate General may, in his discretion, suspend any judge advocate from performance of judge advocate duties pending resolution of an allegation which, if substantiated, would reflect adversely on fitness for duties as a judge advocate.

2. The foregoing provision will appear in the next regular revision of JAGC Personnel Policies and AR 27-1.

FOR THE JUDGE ADVOCATE GENERAL:

JOHN R. BOZEMAN
Colonel, JAGC
Executive

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF
DAJA-AL

8 NOV 1984

SUBJECT: Terrorist Training-Policy Letter 84-4

ALL STAFF JUDGE ADVOCATES

1. The Army remains a potential target for terrorist activities both within CONUS and overseas. Accordingly, our Judge Advocates must be thoroughly familiar with their responsibilities and duties in the event of terrorist incidents involving their installation, activities or units.

2. The Judge Advocate General's School is currently reviewing and updating courses of instruction to insure that terrorism is adequately addressed. All Staff Judge Advocates must also insure that Judge Advocate personnel are properly trained in the legal aspects of countering terrorist incidents. As a minimum, all SJA personnel should have a working knowledge of the guidance on terrorism that is found in AR 190-52, TC 19-16, and the Memorandum of Understanding between Department of Defense, Department of Justice, and Federal Bureau of Investigation, subject: Use of Federal Military Force in Domestic Terrorist Incidents.

3. Training of Judge Advocate personnel in this area will be a subject of special interest during General Officer Article 6, UCMJ visits.

Hugh J. Clausen
HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-KL

27 MAR 1985

SUBJECT: Acquisition Law Specialty (ALS) Program

ALL STAFF JUDGE ADVOCATES

1. I am pleased to announce a new JAGC Acquisition Law Specialty (ALS) Program, which is the first of several initiatives we are taking to help the Army accomplish its increasingly important acquisition mission.

2. The ALS Program establishes a centrally managed system for selecting, assigning, and training acquisition lawyers so that we as a Corps can develop the requisite expertise which our client needs. It represents the first effort within the JAGC to provide a specialist career field and separate career management for JAGC acquisition attorneys Army-wide.

3. This program will open more opportunities for acquisition legal work at all levels. For example, as a result of a memorandum of understanding we concluded last year with the General Counsel of the Army and the Command Counsel, Army Materiel Command, it will enable JAGC and Army civilian attorneys to become full legal partners in systems acquisition and procurement of major end items. This will permit the Army to integrate and develop the best of both its military and civilian legal acquisition talent, which is a goal of our highest Army leadership.

4. To help develop substantive expertise, I have approved an Advanced Acquisition Law Course to begin this fall at the Judge Advocate General's School and have tasked the School to develop such other acquisition law courses as may be necessary to ensure that the Army's acquisition attorneys -- both military and civilian -- are among the finest in every respect.

5. I have tasked the Chief, PP&TO, with timely implementation of this program and directed the Assistant Judge Advocate General for Civil Law to provide necessary oversight. PP&TO will announce details on program implementation in the near future.

6. I particularly want to emphasize my personal commitment, and that of the JAGC senior leadership, to support this program fully, both now and in the future.

Hugh J. Clausen

HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

cant in terms of defendants' rights to review, it also significantly affects the government's appellate procedures and alternatives. In fact, the change was initiated within the Department of Defense (DOD) and received generally broad support from The Judge Advocates General of the military services. Additionally, organizations and interest groups ranging from the American Civil Liberties Union to the American Bar Association expressed near unanimous support for the Act. This article will discuss the considerations and motivations underlying this Act and will analyze its facets, the mechanics involved in implementing its requirements, and its future implications for the military justice system.

I. Background

The United States Court of Military Appeals underwent a phenomenal personnel change during the decade ending in 1980. During the period spanning and including the years 1974 through 1980, every judge on the court was replaced for various reasons.[3] The consequences of this total personnel turnover continue to crop up even today, and, in all likelihood, will continue throughout this decade. One of these consequences has been the very vigorous support DOD has given to proposed reforms of the Uniform Code of Military Justice (UCMJ) dealing with CMA. Supreme Court review of CMA decisions was one of the reforms supported by DOD and will likely be followed by others.

The reasons for DOD concern about the membership of CMA become apparent when one considers the court's vacillations in numerous areas of military law during the 1970s. The changes and uncertainty wrought by CMA were particularly acute in fourth amendment search and seizure issues. Two sets of cases illustrate the point especially well. In 1969, CMA articulated a *per se* rule of court-martial jurisdiction over all drug offenses committed by service members, including those committed off post.[4] In 1976, however, the court reversed itself by disgarding the *per se* approach and instituting instead a criteria-based jurisdiction test for off-post drug offenses.[5] By the time the court again reversed itself in 1980 and resumed following a near-*per se* rule in *United States v.*

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the possibility of also providing for Supreme Court review of CMA. *See generally* Noyd v. Bond, 39 U.S. 683 (1969); Smith v. Whitney, 116 U.S. (1 Wall.) 243 (1886). *In re* Yamashita, 327 U.S. 1 (1946); *In re* Vida, 179 U.S. 126 (1900).

[3]Of particular concern to DOD was the fact that one of the departing judges, Judge Duncan, had left CMA to be a judge on a federal district court. Current members of CMA are Chief Judge Robinson O. Everett, appointed by President Carter in 1980; Judge Albert B. Fletcher, appointed by President Ford in 1975; and Judge Walter Cox, appointed by President Reagan in 1984.

[4]United States v. Beeker, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

[5]United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976). In rejecting the per se approach, the CMA concluded that "merely because the recipient was a soldier is insufficient, in and of itself, to establish the service connection." *Id.* at 28.

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Editor
Captain Debra L. Boudreau

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Trottier,[6] the machinery for changing appropriate UCMJ provisions had already been set in motion.[7]

Similarly, in early 1976 each judge on the court arrived at a different conclusion and wrote a separate opinion when faced with the issue of admitting narcotics discovered by a drug detection dog during a barracks inspection of wall lockers in a common area.[8] Two of the three judges concurred in the result that prohibited the use of the narcotics for courts-martial purposes. One judge went so far as to state that a dog's sniff in itself is a search.[9] Later that year, CMA clarified restrictions on the use of detection dogs and prohibited the evidentiary use of contraband discovered by dogs during nonprobable cause inspections of individual barracks rooms.[10]

In 1980, the promulgation of the Military Rules of Evidence (Rule) made it clear that a commander's use of drug detection dogs could be more pervasive than indicated in these CMA decisions. Rule 313(b) is sufficiently broad to encompass admission of evidence produced during most canine-assisted inspections.[11] The resultant change to inspection procedures came, once again, at a time when the impetus for some kind of alteration of CMA had already received partial fruition through proposals in the Department of Defense and in Congress.

III. Legislative History

Department of Defense personnel who initially supported legislation placing the Court of Military Appeals under the Supreme Court's review authority characterized these and other CMA decisions in rather harsh terms. In 1980 hearings before the Military Personnel Subcommittee of the House Committee on Armed Services, Rear Admiral C.E. McDowell, The Judge Advocate General of the Navy, described CMA as a "revolving door with its judges."[12] He deplored its activist nature and what he believed to be its use of legal doctrines not found in federal courts.[13] Major General Alton H. Harvey, The Judge Advocate General of the Army, noted his belief that CMA had departed from the service-connection test set out by the Supreme Court in *O'Callahan v. Parker*[14] and indicated that CMA was departing from the analysis used by the federal courts in applying *O'Callahan* in similar cases.[15] The Judge Advocates General, as well as Assistant DOD General Counsel Robert Gilliat, were particularly concerned with these developments because appellate review for the government beyond CMA was nonexistent.[16] The only government recourse was congressional legislation or an executive order. Defendants, however, had recourse in the federal court system through collateral attacks on unfavorable decisions.

Additionally, the Noncommissioned Officers Association assessed the situation in blunt terms. In a letter to Representative Melvin Price, Chairman of the House Committee on Armed Services, the Association stated its belief that "lately, the Court of Military Appeals has leaned heavily in favor of the ac-

[6] 9 M.J. 337 (C.M.A. 1980). *See also* Schutz, Trottier *and the War Against Drugs: An Update*, The Army Lawyer, Feb. 1983, at 20.

[7] *See infra* text accompanying notes 19-21.

[8] United States v. Thomas 1 M.J. 397 (C.M.A. 1976).

[9] *Id.* at 405 (Ferguson, J., concurring).

[10] United States v. Roberts, 2 M.J. 31 (C.M.A. 1976).

[11] Military Rules of Evidence (Mil. R. Evid.) 313 (b), 1 Sept. 1980. The drafters of the Rule intended that its language encompass the use of drug detection dogs, noting that it permits the use of "any reasonable or natural technological aid." Manual for Courts-Martial, United States, 1969 (Rev. ed), A18-41 (C3, 1 Sept. 1980).

[12] *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process: Hearings on H.R. 6406 and H.R. 6298 Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 96th Cong., 2d Sess., 61 (1980) (testimony of Rear Admiral C. E. McDowell, TJAG, Dep't of the Navy) [hereinafter cited as Hearings on H.R. 6406 and H.R. 6298].

[13] *Id.* at 62.

[14] Hearings on H.R. 6406 and H.R. 6298 at 64 (statement of Major General Alton H. Harvey, TJAG, Dep't of the Army (citing 395 U.S. 258 (1969))).

[15] *Id.* (statement of Major General Alton H. Harvey, TJAG, Dep't of the Army).

[16] *See generally* Hearings on H.R. 6406 and H.R. 6298 at 50-75.

cused, seemingly without considering the military viewpoint."[17]

While the DOD General Counsel and The Judge Advocates General of the military services saw the absence of government appeal as one of the factors leading to what they believed to be unjustifiable CMA decisions, this was not the sole source of trouble. Their testimony posited the small size of the court and its rapid personnel turnover as contributing and aggravating factors. General Harvey pointed out that during the ten year period ending in 1980, eight different judges sat on the three judge court.[18]

The DOD response to CMA's vacillations was essentially three-pronged. A January 2, 1980 letter from Acting General Counsel Niederlehner to Massachusetts Representative Thomas P. O'Neill, Democratic Speaker of the House, enclosed proposed legislation that would carry out the DOD solution.[19] The resulting bill, H.R. 6298, provided for an increase in the number of CMA judges from three to five, gave full fifteen year terms to each person appointed a CMA judge, and provided for discretionary review of CMA decisions by the United States Supreme Court.[20] A companion bill, H.R. 6406, sponsored by Texas Representative Richard C. White, Democratic Chairman of the House Military Personnel and Compensation Subcommittee of the House Armed Services Committee, included these three provisions as well as improvements in the retirement system for CMA judges. The retirement provisions in H.R. 6298 had been deleted by the Office of Management and Budget pending a general review of DOD retirement plans.[21]

The House Military Personnel Subcommittee had difficulty supporting an improved retirement plan for CMA judges. It eventually left resolution of the issue for another day.[22]

On September 23, 1980, the subcommittee chose to write a clean bill containing substantially all of the Administration's proposals from H.R. 6298.[23] On September 25, 1980, the clean bill, H.R. 8188, was approved by the House Committee on Armed Services, and on September 26, 1980, it was reported to the House of Representatives, passing that body on October 2, 1980.[24] This action was taken late in the 96th Congress, however, and because of the timing it did not receive formal Senate consideration.

The Department of Defense follows a fixed procedure for proposing legislation to Congress.[25] Although the 1980 legislation was not passed, other proposals were submitted during future sessions for congressional consideration. Five DOD-generated proposals were passed by both houses the following year in legislation entitled the Military Justice Amend-

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[17]*Id.* at 96 (letter of C. A. McKinney, Vice President of the Noncommissioned Officers' Ass'n of the U.S.A.).

[18]*Id.* at 64 (statement of Major General Alton H. Harvey, TJAG, Dep't of the Army).

[19]*Id.* at 41-43 (letter of L. Niederlehner, Acting General Counsel, DOD).

[20]These changes also received the support of the American Bar Association (ABA). The ABA also strongly urged inclusion of retirement benefits for judges. *Id.* at 90 (letter of E. R. Lanier, Governmental Relations Office, ABA).

[21]*Id.* at 1 (subcommittee minutes).

[22]*Id.* at 115.

[23]*Id.*

[24]126 Cong. Rec. 29,011 (1980).

[25]Proposals begin as staff papers prepared by a "Working Group," made up of mid-level judge advocates of each service. The proposals are then forwarded to the "Joint Service Committee," made up of senior judge advocates. From the Joint Service Committee, the proposals are passed to the "Code Committee," comprised of the services The Judge Advocates General and the judges of the Court of Military Appeals. After the Code Committee's revisions are reviewed by the Joint Service Committee, the proposals are sent to the DOD General Counsel's office, where they are placed in legislative reference channels for the comments of the Joint Chiefs of Staff and the military services. Finally, they are reviewed by the Office of Management and Budget before being forwarded to Congress. *See Amendment of Chapter 46 of Title 10, U.S. Code (UCMJ) to Improve the Military Justice System: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services,* 97th Cong., 2d Sess. 24-25 (1982) (statement of William H. Taft IV, General Counsel, DOD) [hereinafter referred to as Hearings on S. 2521].

ments of 1981.[26] None of the provisions addressed directly the problems identified in the 1980 debates on changes to the Court of Military Appeals, but DOD continued to pursue its goal of attaining Supreme Court review of CMA decisions.

To further that goal, the General Counsel of the Department of Defense, William H. Taft IV, testified before the Senate Subcommittee on Manpower and Personnel of the Committee on Armed Services. Again, two very similar bills were before a subcommittee. One bill, S. 2521, was sponsored by Iowa Republican Senator Roger W. Jepsen. The other originated in the Department of Defense and was simply referred to as "the Department of Defense bill." Both bills were much more comprehensive in scope than H.R. 8188 and its predecessors.[27] Although S. 2125 proposed retirement provisions for CMA judges that were similar to those found in the Tax Court enabling legislation,[28] it did not provide for Supreme Court review of CMA decisions as did the DOD bill. In fact, Senator Jepsen carefully questioned Mr. Taft during the General Counsel's presentation of this provision of the DOD bill.[29]

The provision quickly gained support from primarily the same quarters that endorsed the earlier House-sponsored legislation. The ABA once again voiced its approval.[30] In addition, a broader range of the political spectrum was represented among the organizations endorsing the new bill. The American Veterans Committee (AVC) supported the concept of Supreme Court review but coupled its support to the notion that one CMA judge alone should be able to grant a petition for CMA to hear a case in the first place.[31] The AVC's comments on the matter evidenced a very clear concern for accused's rights, rather than for government recourse. The Committee on Military Justice of the New York City Bar Association expressed its support for the measures in terms similar to those used by the AVC.[32]

Also describing reasons quite different from those given by DOD, the American Civil Liberties Union (ACLU) lent its support to the concept of Supreme Court review of CMA decisions. In his testimony before the Senate subcommittee, Eugene R. Fidell of the ACLU urged that "highest priority" be accorded to enacting this change.[33] Fidell's concern was that without Supreme Court review, the military justice system was a "stepchild of American criminal law" and service members were being treated as "second-class citizens."[34] In particular, he castigated the UCMJ for leaving collateral attack in the federal court system as the only route available to accused who had exhausted their remedies in the military courts.[35] Service members did not have the same opportunities for direct review by the Supreme Court as did

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[26]Military Justice Amendments Act of 1981, Pub. L. No. 97-81, 95 Stat. 1085 (1981) (codified as amended in scattered sections of 10 U.S.C.). The changes affected appellate leave of convicted accused, post-trial confinement, right to military counsel, notice of right to petition CMA, and review of records of trial by the service TJAG.

[27]While H.R. 8188 dealt primarily with changes to CMA, including retirement, membership increase, full 15-year terms, and discretionary review by the Supreme Court, S. 2521 and the DOD bill affected additional sections of the UCMJ. In addition to the DOD proposal of Supreme Court review and a proposal in S. 2521 to provide a new retirement plan for the judges, these bills also proposed a separate article for drug offenses, suspension of sentences by military judges at the trial level, interlocutory appeal by the government, and the requirement that an accused file a notice of appeal in certain cases as a prerequisite to review by a Court of Military Review. *See generally* Hearings on S. 2521 at 23-47 (statement of William H. Taft IV, General Counsel, DOD).

[28]26 U.S.C. § 7447(b) (1982).

[29]Hearings on S. 2521 at 20 (statement of William H. Taft IV, General Counsel, DOD).

[30]*Id.* at 183 (statement of Ernest H. Fremont, Chairman, ABA Standing Comm. on Mil. Law).

[31]*Id.* at 286 (statement of Frank E. G. Weil, National Secretary, American Veterans Comm.).

[32]*Id.* at 281 (statement of Steven S. Honigman, Chairman, Comm. on Mil. Justice and Mil. Affairs of the Assn. of the Bar of the City of N.Y.). Honigman is currently serving on the commission created by the Military Justice Act of 1983 to study the need for further changes to the UCMJ. Army Times, Mar. 19, 1984, at 29, col. 1.

[33]Hearings on S. 2521 at 198 (testimony of Eugene R. Fidell, ACLU).

[34]*Id.* at 205 (statement of Eugene R. Fidell, ACLU).

[35]*Id.* at 204-05.

persons convicted in civilian courts. He responded to earlier arguments that the measure would increase the Supreme Court workload by noting that the important cases would be heard eventually by the Court upon collateral attack anyway.[36] The proposed measure was better because it eliminated the delays associated with collateral attack.[37] In countering the proposition that an accused with free government-provided appellate counsel would overburden the Solicitor General's office with frivolous appeals, he emphasized that military counsel are subject to the Code of Professional Responsibility and its prohibition against needless appeals.[38] Furthermore, he pointed out that the Solicitor General's office often makes no response at all to obviously frivolous appeals.[39]

By the time the Senate subcommittee began its deliberations on S. 2521 and its companion DOD bill, some of the key players who had supported the earlier House bill were gone. Although most of the other service The Judge Advocates General either supported or made no mention of Supreme Court review of CMA decisions when they appeared before the subcommittee, Major General Hugh J. Clausen, who had replaced General Harvey as The Judge Advocate General of the Army, expressed reservations about the proposal. In his oral testimony before the subcommittee on September 9, 1982, General Clausen said the provision merited further study before implementation.[40] He felt the government would immediately be at a disadvantage because it would be required to go through the Solicitor General before it could ask for certiorari.[41] He also stated his belief that the military petitions would significantly add to the burden of the Supreme Court.[42]

Although the change in the Army's position may simply be attributable to having a new The Judge Advocate General, more likely it was also a function of the personnel changes in CMA itself. At that time, President Carter had appointed Robinson O. Everett as Chief Judge of the Court of Military Appeals. His influence was immediate and steadying, particularly in search and seizure issues. The opinion in *United States v. Trottier*,[43] written by Chief Judge Everett, was a paradigm of his influence. In *Trottier*, Chief Judge Everett effectively returned CMA to its near *per se* rule that courts-martial have jurisdiction over off-post drug offenses.[44] Consequently, many of the concerns that initially led DOD to propose Supreme Court review had been allayed.

The Judge Advocates Association, represented by Professor John J. Douglass, former Commandant of The Judge Advocate General's School, US Army, and then dean of the National College of District Attorneys, also expressed reservations about the measure. Professor Douglass stated his contention that few cases have arisen in which "the Government could have successfully sought certiorari to the Supreme Court of the United States from the Court of Military Appeals."[45] As a result, the DOD bill's effect would be to provide simply another course of review for an accused. Taking into account the Supreme Court's reluctance to expand its workload and the fact that the legislation would limit the Court's review to only those cases in which CMA had granted review, Professor Douglass counseled against the change.[46] He characterized CMA as the "service

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[36] *Id.* at 212.

[37] *Id.* at 211-12.

[38] *Id.* at 210-11. *See generally* Model Code of Professional Responsibility Rule 2-109 (1979).

[39] Hearings on S. 2521 at 199 (testimony of Eugene R. Fidell, ACLU).

[40] *Id.* at 44 (testimony of Major General Hugh J. Clausen, TJAG, Dep't of the Army).

[41] *Id.*

[42] *Id.*

[43] 9 M.J. 337 (C.M.A. 1980).

[44] *Id.* at 350.

[45] Hearings on S. 2521 at 271 (statement of John J. Douglass (COL, ret.), Judge Advocates Assn.).

[46] *Id.*

[member's] supreme court''[47] and urged finality at that level.[48]

In his testimony before the subcommittee on September 16, 1982, Chief Judge Everett was, at best, neutral on the subject and probably against it. He responded to the ACLU's comment that service members are second class citizens in their legal rights by emphasizing their right of collateral attack and what he considered unparalleled appellate rights.[49] He also urged a cost-benefit analysis of the proposed change. In particular, he suggested careful consideration of the cost of losing a ''unique and distinct history of military justice,'' the cost to DOD of providing attorneys to handle the appeals, and the costs to the Solicitor General's office.[50] Chief Judge Everett also predicted that adding Supreme Court review would delay completion of the entire review process and would increase the Supreme Court docket.[51] He also made the very key observation that the legislation as written would give CMA power to decide what cases would be eligible for Supreme Court review.[52] Because the right to Supreme Court review would extend only to those cases that CMA had heard, CMA's decision to deny a petition for review would effectively preclude any direct appeal to the Supreme Court. Judge Everett suggested that this was power that should not be left to CMA so as to preserve its objectivity and avoid undue influence in its dterminations to grant petitions of review.[53] Judge Cook agreed with Chief Judge Everett and advised the subcommittee members to proceed with caution in their deliberations.[54]

[47]Professor Douglass was alluding to Harold Nufer's book American Servicemember's Supreme Court: Impact of the U.S. Court of Military Appeals on Military Justice (1981).

[48]Hearings on S. 2521 at 267 (testimony of John J. Douglass (COL, ret.), Judge Advocates Ass'n).

[49]*Id.* at 109 (testimony of Robinson O. Everett, C.J., CMA).

[50]*Id.* at 109, 135.

[51]*Id.* at 135.

[52]*Id.* at 136.

[53]*Id.* at 136-37.

[54]*Id.* at 110 (testimony of Judge William Cook, Associate Judge, CMA).

Using S. 2521 and the DOD bill as his guide, Senator Jepsen drew up a clean bill, S. 974 (the Military Justice Act of 1983).[55] On March 22, 1983, the Senate Armed Services Committee voted to report S. 974 to the Senate.[56] This report was made on April 5, 1983,[57] and the Senate subsequently passed the bill on April 28, 1983.[58] Although the bill was referred to the House on May 4, 1983,[59] hearings were not held in the House Subcommittee on Military Personnel and Compensation until November 9, 1983.[60]

At that time, the House subcommittee received testimony from generally the same persons who testified over a year earlier to the Senate subcommittee in its hearings on S. 974's predecessors. As did its antecedents, the bill enjoyed the support of the DOD General Counsel, as well as support in the form of written statements from the ACLU and the New York City Bar Association. In a statement submitted to the subcommittee, General Counsel Taft noted that the Court of Military Appeals interprets federal statutes, including the UCMJ, executive orders, departmental regulations, and the Constitution.[61] He emphasized that ''there is no other federal judicial body whose decisions are similarly insulated from Supreme Court review.''[62] Taft also pointed out that the difficulties service members encounter in federal courts in collaterally attacking their convictions. Quoting Professor Moyer, he characterized collateral attack as ''a judicial trek that has

[55]*See* 129 Cong. Rec. S5613-98 (daily ed. Apr. 28, 1983) (statement of Senator Jepsen).

[56]*Id.*

[57]S. Rep. No. 53, 98th Cong., 1st Sess. (1983).

[58]129 Cong. Rec. S5614-98 (daily ed. Apr. 28, 1983).

[59]129 Cong. Rec. H2667-98 (daily ed. May 4, 1983).

[60]*Uniform Code of Military Justice Improvement: Hearings on S. 974 Before the Subcomm. on Mil. Personnel and Compensation of the House Comm. on Armed Services*, 98th Cong., 1st Sess. (1983) [hereinafter referred to as House Subcomm. Hearings on S. 974].

[61]House Subcomm. Hearings on S. 974 at 41 (statement of William H. Taft IV, General Counsel, DOD).

[62]*Id.*

been criticized as inefficient, costly, time-consuming, and redundant."[63] This time General Clausen did not qualify his support for the change. Instead, his written statement to the subcommittee indicated satisfaction with the reivew and revisions. General Clausen described the bill as an "excellent product" of "thorough examination and thoughtful revision. . . ."[64] In an oblique reference to Supreme Court review, he noted that changes in the appellate process "improve the administration of justice by ensuring that each party has a full opportunity for appellate review. . . ."[65]

Only Chief Judge Everett continued to express some doubt about the wisdom of the change. He stated:

> I also have observed that . . . the Department of Defense has been a principal proponent of this change. I assume the Department has taken into account the impact of the change on the ability of the armed services to perform their mission. As a matter of fact, most of my worries about the certiorari proposals have now been dispelled by my reflecting on an ancient maxim that I learned long ago in law school: *Volenti non fit injuria* ("He who consents cannot receive injury," . . .").[66]

When considered along with General Clausen's initial reluctance to endorse this measure, comments such as these indicate that although the proposal came from DOD, it remained problematic to some whether the government position in appeals to and beyond CMA would be improved.

Chief Judge Everett's doubts notwithstanding, the House subcommittee concluded its hearings in ten minutes and approved the bill on the same day.[67] The bill was approved with equal dispatch by the full House Committee on Armed Services on November 15, 1983[68] and by two-thirds voice vote of the House on November 16, 1983.[69] The President then signed the bill into law as the Military Justice Act of 1983 on December 6, 1983.

III. Provisions of the Military Justice Act of 1983

The operative sections of the Military Justice Act of 1983 affecting appellate review by the Supreme Court are relatively restrictive in scope. They limit review to four situations:

> (1) Cases reviewed by the Court of Military Appeals under section 867(b)(1) of title 10.
>
> (2) Cases certified to the Court of Military Appeals by the Judge Advocate General under section 867(b)(2) of title 10.
>
> (3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(3) of title 10.
>
> (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Military Appeals granted relief.[70]

The cases referred to in section 867(b)(1) (Article 67 of the UCMJ) are cases in which a court of military review has affirmed a sentence of death.[71] Until 1983, this section also included sentences affecting general officers and flag officers, but the Act deleted the requirement for CMA to review those cases.[72] Section 867(b)(2) refers to cases that a court of military review

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[63]*Id.* at 38 (quoting H. Moyer, Justice and the Military (1972)).

[64]*Id.* at 42 (statement of Major General Hugh J. Clausen, TJAG, Dep't of the Army).

[65]*Id.* at 43.

[66]*Id.* at 49 (statement of Robinson O. Everett, C.J., CMA (quoting Black's Law Dictionary (4th ed. 1968)).

[67]House Subcomm. Hearings on S. 974 at 50 (subcomm. minutes).

[68]*Uniform Code of Military Justice Improvement: Hearings on S. 974 Before the House Comm. on Armed Services*, 98th Cong., 1st Sess. 3 (1983) (comm. minutes).

[69]129 Cong. Rec. H10026-98 (daily ed. Nov. 16, 1983).

[70]Military Justice Act of 1983 § 10(a)(1), 97 Stat. 1405-06 (1983) (codified as amended at 28 U.S.C. § 1259).

[71]10 U.S.C. § 867(b)(1) (1982).

[72]*Id., amended by* the Military Justice Act of 1983 § 7(d), 97 Stat. 1401-02 (1983).

has previously reviewed.[73] Section 867(b)(3) includes cases that The Judge Advocate General of a military service has declined to certify to CMA after a court of military review has completed its hearing. If a petitioner shows good cause, CMA is nonetheless given authority to review it under this section.[74]

One of the provisions that stimulated much debate in the legislative process was the addition of subparagraph *h* to Article 67 of the UCMJ. It provides that "the Supreme Court may not review by a writ of certiorari under . . . [section 1259 of title 28] any action of the Court of Military Appeals in refusing to grant a petition for review."[75] Its effect is to prohibit Supreme Court review of cases CMA refused to consider. This provision and its implications will be more fully discussed later in this article.

The Act also affects Article 70 (appellate counsel) of the UCMJ. It specifically provides that military attorneys may represent the government in appeals of courts-martial to the Supreme Court when so requested by the Attorney General.[76] Additionally, military appellate counsel are authorized to represent a service member before the Supreme Court when requested by the accused.[77] This development is significant because it is the only step in the appellate process in which military counsel represent accused-service members before an Article III court. Representation by military counsel is not available to service members who collaterally attack their convictions in the federal court system. In addition, the accused continues to have the right to employ civilian counsel for representation at any point in the appellate process.[78]

[73]10 U.S.C. § 867(b)(2) (1982).

[74]*Id.* § 867(b)(3).

[75]10 U.S.C. § 867 (1982), *amended by* the Military Justice Act of 1983 § 10(c)(2), 97 Stat. 1405-06 (1983).

[76]10 U.S.C. § 870(b) (1982), *amended by* the Military Justice Act of 1983 § 10(c)(3)(A), 97 Stat. 1405-06 (1983).

[77]*Id.*, *amended by* the Military Justice Act of 1983 § 10(c)(3)(B), 97 Stat. 1405-06 (1983).

[78]*Id.*

IV. Mechanics and Implications of the Act

The Supreme Court has discretion under the Military Justice Act of 1983 to decide which petitions for certiorari from the military appellate system it will hear. General Counsel Taft emphasized this point in response to questions from members of Congress concerning a possible increase in the Supreme Court's workload.[79] Taft's objective was to reassure the committee members that the change would not exacerbate the Court's already heavy workload. More significant than a Supreme Court-imposed limitation on the military cases it will hear is the built-in limitation found in the Act itself.

Eugene R. Fidell of the ACLU lamented this limitation in his written statement to the Senate Subcommittee on Manpower and Personnel on September 16, 1982.[80] He suggested that the provision for Supreme Court review as proposed (and ultimately enacted) was not "even-handed" in its treatment of defendants in comparison to the government.[81] He gave two interrelated reasons for his contention. The first was that if CMA denies a petition for review under the Act, Supreme Court review of the accused's case is precluded. He described the current CMA court rules that require the vote of two of the three judges to grant a petition for review.[82] Because a majority of the Court of Military Appeals must agree for a petition to succeed, Fidell concluded that a great number of petitions would be weeded out through the mechanics of this process alone.[83] His second point was that even when review is granted by CMA, an inequity may still exist.[84] Fidell emphasized that

[79]Hearings on S. 2521 at 20 (testimony of William H. Taft IV, General Counsel, DOD). The Act is permissive in its terminology concerning review, stating that "[d]ecisions of the United States Court of Miltiary Appeals may be reviewed by the Supreme Court by writ of certiorari. . . ." Military Justice Act of 1983 § 10(a)(1), 97 Stat. 1405-06 (codified as amended at 28 U.S.C. § 1259).

[80]Hearings on S. 2521 at 213 (testimony of Eugene R. Fidell, ACLU).

[81]*Id.* at 212-13.

[82]*Id.* at 213-14.

[83]*Id.* at 213-15.

[84]See supra text accompanying notes 70-75.

most petitions for review are initiated by the accused.[85] If CMA grants relief, the government is free to petition the Supreme Court for further review. If CMA declines to grant the accused's petition, however, the accused does not have further recourse to the Supreme Court. The way is blocked unless the accused collaterally attacks the conviction in the federal courts. As a result, the government has two chances to frustrate the accused's petition for relief at and beyond the Court of Military Appeals, while the accused must first clear the hurdle of achieving CMA review or lose entirely a chance for direct Supreme Court review.

Chief Judge Everett essentially agreed with Fidell's assessment of this facet of the Act. In his written statement to the same subcommittee, he said CMA "would hold the key in allowing caccess to the Supreme Court."[86] He could not predict whether this would influence the number of petitions for review CMA would grant in the future. Chief Judge Everett mentioned the possibility of CMA using a summary affirmance of the conviction in petitions for review.[87] The result would not be the same as "denial of a petition for review which would deny the accused access to the Supreme Court . . . [the summary affirmance] would allow the accused to submit a petition for certiorari to the Supreme Court."[88] Chief Judge Everett warned, however, that such an approach could very well increase the workload of the Supreme Court.[89] He recommended instead that Congress allow the accused to petition the Supreme Court for certiorari in any case in which he or she had previously petitioned CMA.[90] CMA's decision to grant or deny the petition would not be controlling.

In this regard, Chief Judge Everett was generous in characterizing the mechanics of this particular part of the Act. He described the restraints on petitions for certiorari as "an attempt to mitigate the possible burden on the Supreme Court by imposing a limitation that certiorari cannot be granted . . . unless . . . the CMA has granted review in the first instance."[91] Whether this was the true intent behind the limitation or whether the backers of the measure wished to insure that broad Supreme Court review would not put the government at a distinct disadvantage is unknown. A possible resolution of this quandary, which would not require congressional intervention, may lie in a change to the CMA rules of practice. As Eugene R. Fidell mentioned in his Senate subcommittee testimony, these rules currently require the vote of two CMA judges to grant a petition for review.[92] If CMA changes this rule to require only one vote, then artificial ploys such as summary affirmance would be unnecessary. Unfortunately, the result for the Supreme Court would probably remain the same—an increased workload. Chief Judge Everett, however, opposed such a change. He felt that the outcome would only be delayed, not changed.[93] Of course, as Chief Judge Everett noted, Fidell's primary goal in such a procedure would be realized: it would almost certainly increase the number of cases eligible for Supreme Court review.[94]

Another scenario posed by Chief Judge Everett was the possibility that the Supreme Court may hear a petition for certiorari *before* CMA itself decides to hear the case. While Chief Judge Everett recognized that the Act prohibits a petition for certiorari to the Supreme Court when CMA has not first decided the case, he found no clear guidance on a pre-emptive petition to the Supreme Court.[95] He hoped, how-

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[85]Hearings on S. 2521 at 216 (testimony of Eugene R. Fidell, ACLU).

[86]*Id.* at 136 (statement of Robinson O. Everett, C.J., CMA).

[87]*Id.* at 137.

[88]*Id.*

[89]*Id.*

[90]*Id.* at 170.

[91]*Id.* at 136.

[92]*Id.* at 213 (testimony of Eugene R. Fidell, ACLU (referring to CMA Rule of Practice and Procedure 6(a) (July 1, 1983)).

[93]*Id.* at 147 (statement of Robinson O. Everett, C.J., CMA).

[94]*Id.* at 148.

[95]*Id.* at 137.

ever, that in its discretion the Supreme Court would not accept such a petition.[96]

An additional concern, which disappeared with S. 974,dealt with whether "case decisions" or "issues" would be presented to the Supreme Court in certiorari petitions. In the original DOD-generated bill, H. 6298, the Administration proposed that in cases other than those involving death sentences, issues rather than cases be certified to the Supreme Court.[97] The companion bill, H. 6406, which ultimately became the Military Justice Act of 1983, spoke only in terms of cases. This later language can probably be attributed to a discussion during House subcommittee hearings in 1980, where, in response to a query by Representative Richard White, chairman of the House Military Personnel Subcommittee, Robert L. Gilliat, Assistant General Counsel of the Department of Defense, advised against the "issues" language.[98] He agreed with Representative White that it would be a "needless risk to do it on the basis of issues rather than cases."[99] Although neither articulated the source of his reluctance to use the "issues" approach, their concern was obviously based on the "cases and controversy" requirements of Article III of the Constitution.[100] Subsequent bills, including H. 8188 and S. 974, all used the language "cases."

Collateral attack opportunities were not eliminated by the terms of the Military Justice Act of 1983. Considering the limitations on certiorari to the Supreme Court imposed by its language, such a restriction would not be justifiable. In fact, when questioned by the Senate Subcommittee on Manpower and Personnel, Chief Judge Everett concluded that restricting collateral attacks on convictions might be unconstitutional, even in light of the limited opportunity for Supreme Court review.[101] He pointed to the continuing right of defendants in civilian courts to pursue collateral attacks and opined that the only permissible limitation on such an attack would be the requirement that the issues in dispute must have been raised during direct review.[102].

V. Future Developments

While the Military Justice Act of 1983 resulted from earlier attempts to curtail CMA activities that the government believed to be prejudicial to military discipline and contrary to Supreme Court precedents, the scope of the changes to the military justice system by the Act will likely be broader than originally envisioned. In fact, the Act itself may provide the vehicle for some of the changes. Section 9(b)(1) of the Act directs the Secretary of Defense to establish a commission to study the UCMJ and make recommendations on a specified list of topics, including tenure and retirement for the CMA judges.[103] In a written statement to the House Subcommittee on Military Personnel and Compensation, Chief Judge Everett suggested that Congress broaden the commission's mandate and allow it to consider whether the Court of Military Appeals should be an Article III court.[104] This did not occur, but conceivably the committee may interpret its tasks broadly enough to encompass these considerations.

Specifically, Judge Everett recommended a "Court of Appeals for the Military Circuit.[105] He had in mind recent questions about CMA's authority, particularly those questions arising

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[96]*Id.* For a discussion of the rules changes implemented by the Supreme Court in response to the Military Justice Act of 1983, *see* Boskey & Gressman, *The Supreme Court's New Cert. Jurisdiction Over Military Appeals*, 18 M.J. LX (Oct. 9, 1984).

[97]Hearings on H.R. 6406 and H.R. 6298 at 39 (text of H.R. 6298).

[98]*Id.* at 68 (testimony of Robert L. Gilliat, Assistant General Counsel, DOD).

[99]*Id.*

[100]U.S. Const. art. III, § 2. *See, e.g.*, Golden v. Zwickler, 394 U.S. 103 (1969); Poe v. Ullman, 367 U.S. 497 (1961); Doremus v. Board of Education, 342 U.S. 429 (1952).

[101]Hearings on S. 2521 at 170 (statement of Robinson O. Everett, C.J., CMA).

[102]*Id.*

[103]Military Justice Act of 1983 § 9(b)(1), 97 Stat. 1404-05 (1983).

[104]House Subcomm. Hearings on S. 974 at 49 (statement of Robinson O. Everett, C.J., CMA).

[105]*Id.*

in *United States v. Matthews*,[106] a death penalty case. Matthews had been sentenced to be executed for the rape and murder of a Warrant Officer's wife while assigned to a unit in the Federal Republic of Germany in 1979. On appeal, Matthew's attorneys argued that the UCMJ articles dealing with capital punishment were unconstitutional[107] The government appellate counsel made the relatively novel argument that the Court of Military Appeals, an Article I court, was without authority to determine the constitutionality of provisions of the UCMJ, a federal law.[108] The court concluded that it did in fact have authority to determine the constitutionality of federal statutes[109] and held that the procedure then in use to adjudge the death penalty was defective because of the "failure to require that the court members make specific findings as to individual aggravating circumstances."[110] Nevertheless, granting the Court of Military Appeals Article III status would alleviate the continuing uncertainty of CMA's authority, particularly in light of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[111] in which the Supreme Court held that bankruptcy judges could not hear certain cases because they were not Article III judges with the requisite salary and tenure guarantees.[112]

Expansion of the court from three to five members is a real possibility in the near future. In response to a query during his congressional testimony, General Counsel Taft commented that he did not favor adding judges in light of the current stability of CMA.[113] Judge Cook, then the senior member of CMA, recently retired from the court.[114] Legislation to increase the court size may be forthcoming. An expansion of the court to five members has been the most common figure mentioned, primarily because it is the size recommended by the American Bar Association in its standards for federal courts.[115]

The combination of Supreme Court review and a study of tenure and retirement provisions, coupled with the very real possibility of expanding CMA to five judges is, in all likelihood, a precursor to eventual Article III status for the Court of Military Appeals. During the years since 1950 when CMA was created,[116] case law has generally brought military criminal procedure in line with federal and state criminal law.[117] A change that creates Article III status for CMA is a logical step in this evolutionary process.

Article III status for the Court of Military Appeals would significantly affect the court in a number of areas. The salary, tenure, and retirement benefits accorded the judges of Article III courts would be available to the CMA judges. With these privileges would likely come a decrease in the rate of personnel turnover on the

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[106]16 M.J. 354 (C.M.A. 1983).

[107]16 M.J. at 364.

[108]*Id.*

[109]*Id.* at 368.

[110]*Id.* at 379-80. After reversing Matthew's death sentence, the CMA allowed 90 days for Congress or the President to make changes to the sentencing procedures for capital cases. *Id.* at 382. This deadline was not met, and Matthews' sentence was reduced to confinement at hard labor for life. The CMA derived the 90 day deadline from a similar delay the Supreme Court allowed Congress for corrective action after it ruled the bankruptcy court system unconstitutional. *See id.* at 381 (citing Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982)).

[111]102 S. Ct. 2858 (1982).

[112]*Id.*

[113]Taft explained that DOD was satisfied with the current composition of CMA. The court was then experiencing stability in personnel and decisions and DOD was reluctant to upset the balance by appointing new judges before one of the judges sitting left the court. Hearings on S. 2521 at 79 (statement of William H. Taft IV, General Counsel, DOD).

[114]Judge Cook's retirement was effective on March 30, 1984, but he remained on the court during the temporary absence of one of the other judges.

[115]Hearings on S. 2521 at 81 (testimony of William H. Taft IV, General Counsel, DOD (citing Feb. 7, 1980 letter of the ABA Standing Comm. on Mil. Law to the House Armed Services Comm.)).

[116]*See supra* note 2.

[117]*See, e.g.*, Military Rules of Evidence, 1 August 1984. Article 31 of the UCMJ is analogous to the warnings required by the Supreme Court in Miranda v. Arizona, 384 U.S 436 (1966), although Article 31 preceded *Miranda*.

court. The security of tenure as well as the retirement provisions available to Article III court judges should make other pursuits less attractive financially. Additionally, if five judges are appointed to the court upon its acquisition of Article III status, the chances of wide swings in direction when judges leave would be further reduced.

If, as Chief Judge Everett suggested, CMA is made the Court of Appeals for the Military Circuit, the prestige of such a judgeship should rise considerably. Appropriate deference to the court's decisions can be expected from other federal courts as well as state courts. A nationally prominent source of case law and expertise would be available for questions on military law arising in other jurisdictions.

Indeed, in a recent article on possible future changes to appellate review of courts-martial, Chief Judge Everett suggested again that Congress consider reconstituting the Court of Military Appeals under Article III and expand its jurisdiction.[118] He noted that the creation of such status would remove some present confusion about the power of the court and the issues which it may consider, would enhance the court's prestige in the judicial community and make service on the court more attractive, and would provide an opportunity for members of the court, their caseload permitting, to serve occasionally on panels of other courts of appeal, or even at the trial level.[119]

As noted by Chief Judge Everett, if CMA is granted Article III status, any doubts about the authority of CMA to declare congressional legislation unconstitutional would vanish. Arguments such as those presented by government appellate counsel in *Matthews* and the bankruptcy court in *Marathon Pipe* would be untenable. This would be particularly significant because the military justice system has its basis in the Uniform Code of Military Justice, a federal statute, and CMA must daily interpret and construe the Code.

[118]Everett, *Some Observations on Appellate Review of Court-Martial Convictions—Past, Present, and Future*, Fed. B. News & J., Dec. 1984, at 420, 421.

[119]*Id.* at 421-22.

VI. Conclusion

The decision to allow Supreme Court review of CMA rulings was not a sudden occurrence. The proposal was in DOD channels during portions of two presidencies. It came thirty-three years after the creation of the Uniform Code of Military Justice and the Court of Military Appeals. Two essentially different interests groups agreed on the end result. The motivations of these groups in supporting the measure, however, were not in concert. The Department of Defense sought to make CMA more responsive to Supreme Court precedents; the other interest group wanted an alternative to collateral attack of courts-martial convictions. In the end, neither group appears entirely satisfied. The military justice system has moved another step away from insularity from the federal court system, and, with that step, as Professor Douglass noted, it has lost some of its uniqueness. The accused's rights-oriented groups continue to press for unlimited discretion of the Supreme Court to review any petition for review submitted to CMA.

Chief Judge Everett has identified the trend established by these proceedings and predicted the ultimate consequence. A Court of Appeals for the Military Circuit is a logical result both in terms of the current federal judicial system and in terms of the development of systems of appellate review of courts-martial over the past three-plus decades. The unanswered questions, however, are numerous. Most obvious is the issue of the Supreme Court's docket and its ability to handle what will likely be a noticeable increase in petitions for certiorari. From the standpoint of unit effectiveness comes the question of whether such a change would affect the commanders' ability to maintain order and discipline. Would increased access to the civilian court system have an impact on readiness? The experience of the military with CMA, a civilian court, since its creation in 1950 indicates that the answer to the latter question is probably no. DOD's willingness to accept the Military Justice Act of 1983 and with it Supreme Court review of CMA decisions supports that conclusion. Perhaps the issue of greatest uncertainty centers simply on *when* the Court of Military Appeals will finally receive Article III status.

Criminal Law Note
Recent Supreme Court Decisions

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The Supreme Court continues to decide a large number of significant criminal law cases. Already in the 1984-85 Term, the Court has ruled on several fourth amendment cases;[1] the right to a psychiatrist for an indigent accused;[2] prosecutorial misconduct in argument;[3] and other cases involving trial and appellate practice.[4] Two of the cases decided this Term, *Luce v. United States*[5] and *Oregon v. Elstad*,[6] will likely have an immediate impact on the practice of military criminal law.

Luce involved appellate review of motions *in limine* whose basis is that the government will improperly impeach the accused with a prior conviction. The defendant, on trial for conspiracy and possession of cocaine with intent to distribute, moved for an *in limine* ruling to preclude the government from using a prior conviction to impeach him if he testified.[7] The district court ruled that the conviction would be proper impeachment under Federal Rule of Evidence 609(a)[8] and denied the motion. The trial judge rules, however, that he might revise his evidentiary ruling based on the scope and nature of the accused's testimony. The accused did not testify and was convicted.[9]

On appeal, Luce raised the issue of the propriety of the trial judge's *in limine* ruling, arguing that the judge abused his discretion by denying the motion without a specific finding that the probative value of his prior conviction outweighed its prejudicial effect.[10] The Sixth Circuit affirmed the conviction, holding that it would not review *in limine* rulings when the accused did not testify.[11]

The Supreme Court granted certiorari to resolve a conflict among the circuits concerning the reviewability of such rulings when the accused failed to testify.[12] Several circuits

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[1]For example, the Court has addressed questions relating to the valid basis for searches in public schools (New Jersey v. T.L.O., 53 U.S.L.W. 4083 (U.S. Jan. 15, 1985)); automobile searches (United States v. Johns, 36 Crim. L. Rptr. (BNA) 3134 (U.S. Jan. 23, 1985)); seizure of the person (United States v. Hensley, 36 Crim. L. Rptr. (BNA) 3085 (U.S. Jan. 9, 1985)); Hayes v. Florida, 53 U.S.L.W. 4382 (U.S. Mar. 20, 1985); United States v. Sharpe, 53 U.S.L.W. 4346 (U.S., Mar. 20, 1985)); and the reasonableness of a "search" to surgically remove a bullet (Winston v. Lee, 53 U.S.L.W. 4367 (U.S. Mar. 20, 1985)).

[2]Ake v. Oklahoma, 53 U.S.L.W. 4179 (U.S. Feb. 26, 1985).

[3]United States v. Young, 36 Crim. L. Rptr. (BNA) 3143 (U.S. Feb. 20, 1985).

[4]*See, e.g.*, Wainwright v. Witt, 36 Crim. L. Rptr. (BNA) 3116 (U.S. Jan. 23, 1985) (voir dire and challenges in capital cases); Evitts v. Lucey, 36 Crim. L. Rptr. (BNA) 3109 (U.S. Jan. 23, 1985) (right to effective assistance of appellate counsel); United States v. Abel, 36 Crim. L. Rptr. (BNA) 3003 (U.S. Dec. 10, 1984) (use of impeachment evidence).

[5]36 Crim. L. Rptr. (BNA) 3001 (U.S. Dec. 10, 1984).

[6]36 Crim. L. Rptr. (BNA) 3167 (U.S. Mar. 6, 1985).

[7]36 Crim. L. Rptr. (BNA) at 3002.

[8]Federal Rule 609(a), the analog of Military Rule of Evidence 609(a), provides:

> General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty of false statement, regardless of the punishment.

[9]36 Crim. L. Rptr. (BNA) at 3002.

[10]*Id.*

[11]713 F.2d 1236 (6th Cir. 1983).

[12]*See, e.g.*, United States v. Libscomb, 702 F.2d 1049 (D.C. Cir. 1983) (en banc); United States v. Kiendra, 663 F.2d 352 (1st Cir. 1981); United States v. Fountain, 642 F.2d 1083 (7th Cir.), *cert. denied*, 451 U.S. 993 (1981); United States v. Toney, 615 F.2d 277 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980).

reviewed *in limine* rulings whether or not the accused took the stand: the Ninth Circuit allowed review if the defendant unequivocally stated an intention to testify if the motion to exclude the prior conviction was granted and gave an offer of proof concerning the substance of his testimony.[13]

The Court in *Luce* affirmed the Sixth Circuit's ruling, holding that a defendant who does not take the stand after an adverse ruling on an *in limine* motion to exclude prior convictions is not entitled to appellate review of the motion. The Court reasoned that the factual context must be complete for the reviewing court, particularly when faced with evaluating the balancing test of Rule 609(a)(1), and must include knowledge of the precise nature of the accused's testimony.[14] The Court stated that the alternative approach of requiring the accused to make an offer of proof was not acceptable because trial testimony, for any number of reasons, could differ from the offer.[15] In addition, the Court found that requiring a defendant to make a commitment to testify if the motion is granted was virtually meaningless because the commitment is risk free, with no likely means of enforcement.[16] Finally, the Court believed that requiring the accused to testify to preserve Rule 609(a) claims would allow reviewing courts to assess the impact of any erroneous rulings based on the entire record, and would also discourage making such motions to "plant" reversible error in the record without having to take the risk of testifying.[17]

Luce should change military practice. The Court of Military Appeals ruled on a similar issue in *United States v. Cofield*[18] and reached a contrary result. The court rules that although the trial judge should be granted considerable discretion to defer ruling on motions *in limine* until the critical point in the trial, his or her ruling would be reviewable by appellate courts even if the accused did not testify, at least where the defense counsel avers that accused will take the stand if the prior conviction is ruled inadmissible.[19] In fact, Cofield did not testify, but his defense counsel made it clear that he would if the prior conviction was excluded and also stated the general nature of his probable testimony.[20]

In *Cofield*, the Court of Military Appeals followed federal case law and interpretations of the Federal Rules of Evidence to conclude that they could review the *in limine* ruling despite Cofield's failure to take the stand.[21] In fact, the case relied on most heavily by the court was the Ninth Circuit opinion that the Supreme Court expressly disavowed in *Luce*.[22] The Court of Military Appeals relied heavily on Cofield's offer of proof and the defense statement that the accused would testify but for the ruling; the Supreme Court specifically dismissed both of those bases for allowing review.

If the Court of Military Appeals continues to follow federal law in this area, as seems likely, an accused at a court-martial will have to testify to preserve for appeal the denial of a motion *in limine* concerning a prior conviction. Express offers of proof, acceptable under *Cofield*, will not be enough. The Supreme Court specifically addressed and discarded the federal case law that *Cofield* was based on, and it appears that *Luce* should control military practice.

In addition, the rationale of *Luce* may have an impact far beyond its holding. Although the facts deal with motions *in limine* related to prior convictions, the Court's analysis is readily applicable to many other situations involving motions *in limine*, including questions of prior

[13]United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1034 (1980).

[14]36 Crim. L. Rptr. (BNA) at 3002.

[15]*Id.*

[16]*Id.*

[17]*Id.* at 3003.

[18]11 M.J. 422 (C.M.A. 1981).

[19]*Id.* at 431.

[20]*Id.* at 425.

[21]*Id.* at 426-31.

[22]*Id.* at 431 n.13.

acts under Military Rule of Evidence 404(b),[23] uncharged acts of misconduct, impeachment of character witnesses under Rule 608,[24] and the balancing of the evidence's probative value against its prejudicial effect under Rule 403.[25] The Court's rationale was that a reviewing court should not review motions *in limine* concerning factual determinations by trial judges when the factual record is incomplete because the accused did not testify. *Luce's* holding could easily be extended to apply to non-reviewability of other *in limine* determinations if the factual record below is incomplete. Justices Brennan and Marshall recognized the potential reach of *Luce* in their concurring opinion which expressed concern that the case might be interpreted to go beyond Federal Rule of Evidence 609(a) determinations.[26] Justice Brennan pointed out correctly that when the *in limine* ruling is based on a legal determination instead of a factual one, such as in a lower court's ruling concerning admissibility of immunized testimony for impeachment, the ruling should be reviewable by an appellate court.[27] Here the question is one of law that would not necessarily depend on a concrete factual context. Finally, *Luce* might give substance to the language in R.C.M. 905(d) which permits trial judges to defer rulings on motions "for good cause."[28]

[23]Mil. R. Evid. 404(b) makes the usually inadmissible "other crimes, wrongs, and acts" of the accused admissible for certain limited purposes. The military judge is normally asked to rule on the admissibility of this evidence before it is presented to the court-martial.

[24]Mil. R. Evid. 608(b) addresses the use of specific instances of conduct to attack or support the credibility of a witness, including the accused.

[25]Mil. R. Evid. 403 excludes otherwise relevant evidence if the military judge determines that its probative value is substantially outweighed by the danger of unfair prejudice or certain other considerations, including undue delay or confusion of the issues.

[26]36 Crim. L. Rptr. (BNA) at 3003. In United States v. Means, ___M.J.___ (A.C.M.R. 29 Mar. 1985), the Army Court of Military Review recognized that *Luce* had overruled *Cofield* and implied that *Luce's* holding might extend to motions *in limine* concerning adverse evidentiary rulings. *Id.* slip op. at 6 n.5.

[27]*See, e.g.*, New Jersey v. Portash, 440 U.S. 450 (1979).

[28]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 905(d).

Cofield says that the trial judge should have wide discretion to defer ruling on motions *in Limine* and *Luce's* rationale that a complete factual context is needed may well fulfill the "good cause" requirement of the new Manual rule.

In *Oregon v. Elstad*, the Court addressed the effect of a prior unwarned statement on a subsequent confession obtained after a proper rights warning and waiver. Michael Elstad, eighteen years old, was suspected of complicity in the burglary of a home in his neighborhood. Two police officers went to his home with an arrest warrant. After entering the house, one police officer, Officer Burke, accompanied Elstad to the living room and, without reading him rights warnings, began to talk to him about the case. After Elstad stated in response to a question that he did not know why the officers were there, Burke asked if he knew someone named Gross, the victim of the burglary. Elstad admitted that he did and also said that he had heard there was a robbery at the Gross home. The officer then told Elstad that he felt Elstad was involved in the robbery. Elstad replied, "Yes, I was there."[29] At no time during this conversation was Elstad informed of his *Miranda*[30] rights.

Elstad was then brought to police headquarters and processed for formal arrest. He was read his *Miranda* rights for the first time, he indicated that he understood them, and stated that he was willing to talk to the interrogating police officers, the same ones who had arrested him at his home. He then gave a full written confession detailing his involvement in the burglary.[31]

[29]36 Crim. L. Rptr. (BNA) 3168 (U.S. Mar. 6, 1985).

[30]*Miranda v. Arizona*, 384 U.S. 436 (1966), requires police officers to give warnings of the right to remain silent, the right to counsel, and the fact that anything said can be used against the suspect, before any custodial interrogation. The *Miranda* Court determined that police custodial interrogation was inherently coercive and that the advising of these rights was the proper method to overcome the inherent coercion. 384 U.S. at 444-45.

[31]36 Crim. L. Rptr. (BNA) at 3168.

After being charged with first degree burglary, Elstad moved to suppress his oral statement and his signed confession because the oral statement was given without the required rights warnings and his later confession was tainted by the unwarned questioning and his response which "let the cat out of the bag."[32] The trial judge excluded the original statement because of the failure to give the required *Miranda* warnings, but allowed the signed confession because it was freely and voluntarily given after a full rights advisement and found that the second statement was not in any way tainted by the first.[33] The Oregon Court of Appeals reversed, relying on two Supreme Court cases, *Wong Sun v. United States*,[34] which holds that evidence derived from a constitutional violation is "fruit of the poisonous tree," and *United States v. Bayer*,[35] which holds that an initial improper confession presumptively taints any later confession because the psychological effect of the first confession makes the accused believe he has sealed his fate, making him more likely to confess because he has nothing more to lose. The Oregon Court of Appeals found the crucial inquiry to be whether there was a sufficient break in the events to insulate the later warned confession from the taint of the earlier unwarned admission and held that the brief period between the two incidents did not alleviate the coercive impact of Elstad's statement at his home.[36]

The Supreme Court reversed and allowed the later confession to be admitted. The Court held that the mere fact that a suspect had responded to unwarned questioning did not disable him from waiving his rights and confessing after being given proper *Miranda* warnings.[37] The Court found that the failure to read the required warnings was "a procedural *Miranda* violation" and not a violation of the fifth amendment.[38] Because it was not a constitutional violation, but simply a failure to give a procedural warning, the admissibility of any subsequent statement turned solely on whether the second statement was knowingly and voluntarily made. The Court was careful to distinguish situations where the first statement was obtained through coercive means: in those situations, presumably the fifth amendment will be violated by the initial confession and normal derivative evidence rules will apply to later confessions.[39] Although the analysis is puzzling in light of *Miranda's* holding that custodial interrogation is *inherently* coercive and, therefore, warnings are required,[40] the Court seemed to return to common law voluntariness definitions of "coerciveness" to distinguish situations where the police shortcoming is the failure to read rights warnings rather than the use of some other coercive technique.

The Court flatly rejected *Wong Sun's* "poisonous tree" analysis for situations like Elstad's.[41] Unlike violations of the fourth amendment which require exclusion of tainted derivative evidence, simple *Miranda* violations require nothing more than exclusion of the un-

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[32] *Id.* This metaphor came directly from the Supreme Court's earlier decision in *United States v. Bayer*, 331 U.S. 532 (1947), which held that after an accused had made an initial statement, the "cat was out of the bag" and the accused would feel psychologically that there was nothing to lose by confessing further. Of course, this case predates *Miranda*.

[33] 36 Crim. L. Rptr. (BNA) at 3168.

[34] 371 U.S. 471 (1963). In *Wong Sun*, the Court held that evidence and witnesses discovered as a result of a search conducted in violation of the fourth amendment must be excluded from evidence. The later discovered evidence was the "fruit" of the illegal search which was the "poisonous tree."

[35] 331 U.S. 531 (1947).

[36] Elstad v. State, 61 Or. App. 673, 676, 658 P.2d 552, 554 (1983).

[37] 36 Crim. L. Rptr. (BNA) at 3172.

[38] *Id.* at 3169.

[39] *Id.* at 3171 and n.3.

[40] As Justice Stevens' dissent in *Elstad* points out, the basis for *Miranda* is that the failure to give rights warnings sets up an irrebuttable presumption of *coercion* when there is custodial interrogation. 36 Crim. L. Rptr. (BNA) at 3185 (Stevens, J., dissenting). The *Miranda* Court presumed coercion in custodial interrogation, but the *Elstad* Court carefully distinguishes the common law voluntariness meaning of coercion.

[41] 36 Crim. L. Rptr. (BNA) at 3169-70.

warned statement. Thus, the Court excluded Elstad's initial unwarned admission to the police officers, but held that when the "fruit" of a *noncoercive Miranda* violation is the accused's later confession, the only inquiry is whether the later statement was voluntarily and knowingly made.[42] One of the indications that the second statement is voluntary, of course, is the administering of *Miranda* warnings and a knowing, voluntary, and intelligent waiver by the accused.

In addition to ruling out application of the "taint" doctrine where the only police failure was not giving the warnings, the Court discarded the idea that the earlier confession necessarily compromised the voluntariness of the second statement. The lower court's view, relying largely on the Supreme Court's own language in *Bayer*, was that the prior answers impaired Elstad's ability to give a valid waiver because of the psychological effect of already giving incriminating evidence to the police. The Court characterized this as a "subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate,"[43] but rejected this analysis as "speculative" when applied to prior unwarned yet *voluntary* admissions.[44] Again, the Court returned to the point that failure to give required warnings may be improper, but it does not make the unwarned admission "involuntary" in the sense of being coerced.

The Court then turned to the facts in *Elstad* to determine if the second statement was voluntary. They found that the reading of rights was complete and that Elstad knowingly and intelligently waived his right to remain silent and confessed his part in the burglary. The Court also found that neither the environment or manner of either the interrogation at the home or at the police station was coercive.[45] In addition, it rejected Elstad's contention that he did not give a fully informed waiver of his rights because the police officers did not inform him that his prior statements could not be used against him. The Court said that this practice of requiring a "cleansing warning" was neither practicable or constitutionally necessary, reasoning that police officers were ill-equipped to make legal judgments about whether the first statement would be admissible.[46]

The majority attempted to stress that it was not intending to deviate from the bright line of *Miranda*.[47] The unwarned admission must still be excluded from evidence. There is, however, no presumption of a later coercive effect when a suspect's initial inculpatory statement is voluntary, though technically in violation of warning requirements. At that point, the court must determine whether the second statement was voluntarily made by focusing on the surrounding circumstances, the totality of police conduct toward the accused, and, especially, the highly probative fact that the suspect chooses to speak after being fully informed of his rights.[48]

Prosecutors and police officials should be aware that Justice O'Connor's majority opinion warned[49] that his ruling was *not* a way to circumvent proper procedures for taking statements. Police should *not* be advised to purposely neglect to give rights warnings in the hope that an incriminating statement might lead to a later, properly warned confession. The majority's holding specifically states that they are not creating a good faith *Miranda* ex-

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[42] *Id.* at 3172.

[43] *Id.* at 3170. The Court discussed *Bayer*, where this type of analysis originated, but did not expressly overrule its holding.

[44] *Id.* at 3171. The Court again finessed the idea that *Miranda* seemed to stand for, that unwarned confessions are involuntary because the lack of warnings creates a presumption of coercion. Military Rule of Evidence 304(c)(3) defines as "involuntary" a statement obtained in violation of warning and waiver requirements. Analysis of the 1980 Amendments to the Manual for Courts-Martial, located in MCM, 1984, Appendix 22.

[45] 36 Crim. L. Rptr. (BNA) 3171.

[46] *Id.* at 3172.

[47] "The Court today in no way retreats from the bright line rule of *Miranda*." 36 Crim. L. Rptr. (BNA) 3172.

[48] *Id.*

[49] *Id.* at 3172 and n.5.

ception;[50] nor is the Court likely to look favorably on police officials or prosecutors who attempt to play fast and loose with rights warning requirements. In fact, one of the factors the Court stresses is the "entire course of police conduct" when taking the confessions. Military trial counsel should not use the *Elstad* holding to teach police officials a way to avoid giving rights warnings and still maintain the possibility of getting an admissible confession.

Elstad's holding is a considerable departure from current military case law on the effect of prior unwarned statements on later confessions. The Court of Military Appeal's most recent decision on this issue, *United States v. Butner*,[51] is based on principles that the Supreme Court clearly rejects in *Elstad*.

Airman Butner had worked for the Air Force security police as an informant in drug operations. After a color television set was stolen from a dayroom at Carswell Air Force Base, the security police received an anonymous tip that the stolen property was in Butner's apartment. Sergeant Whalen, a security police officer who knew Butner from his activities as an informant, telephoned the apartment and talked to Butner. Whalen told him he needed to see him right away and added, "While you are at it, bring the television with you." After a pause, Whalen asked, "Do you know which television?" and Butner replied, "Yes."[52] Butner was apprehended and the television set was seized. At no time over the phone did Whalen advise Butner of his Article 31(b) rights.[53]

Butner was brought to the security police station and was fully informed of his rights, which he waived. He confessed to stealing the television set. Three days later, after the police became aware that the earlier confession and the television set might not be admissible, they called Butner back to the station. He was again fully advised of his rights, including a "cleansing warning" which told him that the prior statements could not be used as evidence against him.[54]

At trial and on appeal, the main issue centered on the admissibilty of Butner's second confession, given three days after the first. The government conceded that the telephone conversation was improper because of the failure to give rights warnings and conceded that the first confession was tainted by the unwarned admission.[55] The Court of Military Appeals addressed the issue of whether the second confession was tainted by the initial illegality.

The court stated that the first confession was inadmissible because nothing intervened to break the chain of events started by the unwarned phone conversation.[56] The court also found that merely administering full rights warnings was insufficient to remove the taint.[57]

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[50] *Id.* at 3172.

[51] 15 M.J. 139 (C.M.A. 1983).

[52] *Id.* at 141.

[53] Article 31(b) of the Uniform Code of Military Justice requires that military interrogators give warnings of the offense suspected of, the right to remain silent, and the fact that statements made can be used against the suspect. Article 31(b) is triggered when the person being questioned is an "accused or suspect." This means that even if the questioning does not occur in a custodial setting, which is the trigger for *Miranda* warnings, military accused or suspects are entitled to Article 31(b) warnings.

[54] 15 M.J. at 141-42.

[55] *Id.* at 142-43.

[56] *Id.* at 143.

[57] The facts in *Butner* raise an additional issue that was not present in *Elstad*. The security police did not have probable cause to apprehend Butner and it could be argued that all the statements given were the result of an illegal arrest in violation of the fourth amendment. In that circumstance, "fruit of the poisonous tree" analysis does apply and the government must try to show that the taint of the fourth amendment violation has been attenuated. The *Elstad* Court recognized this distinction between fourth amendment violations and violations of *Miranda* warnings requirements. 36 Crim. L. Rptr. (BNA) at 3169. In these circumstances, simply administering rights warnings is insufficient, in itself, to attenuate the taint. Taylor v. Alabama, 457 U.S. 687 (1982). The Court of Military Appeals has also recognized, however, that custody and arrest in the military are different than in the civilian community and that military members may be ordered to report to certain locations, including police stations, without an apprehension taking place. *See* United States v. Schneider, 14 M.J. 189 (C.M.A. 1982); United States v. Sanford, 12 M.J. 170 (C.M.A. 1981).

After these introductory statements, the court discussed whether the second confession was also tainted, relying on principles similar to the "fruit of the poisonous tree" doctrine of *Wong Sun*. The court listed several factors that should be used to determine whether the taint from a prior unwarned interrogation had been overcome, including the time lapse between the questioning periods; whether the accused was questioned by the same person both times; the administering of rights warnings at the second confession, particularly a "cleansing warning"; and whether the questioner relied on the prior admission in seeking a subsequent statement.[58] Using these factors, the court upheld the admission of Butner's second confession.

The court's analysis and reasoning in *Butner* went far beyond what the Supreme Court set as the constitutional standard in *Elstad*. The Supreme Court categorically rejected the need to apply a "taint" doctrine to confessions given after an initial unwarned statement if the only illegality was the failure to given required warnings. In fact, under the Supreme Court's analysis in *Elstad*, Butner's fully warned confession at the police station on the same day as the telephone conversation should have been admissible as long as the circumstances showed that it was voluntary. The Supreme Court also rejected the notion that a cleansing warning is required, going so far as to call them impractical. The majority opinion discussed some considerations for admitting later confessions that are similar to the factors that the Court of Military Appeals listed in *Butner*, such as a break in time or a change in interrogators. The Court concluded, however, that such considerations are only relevant when the first statement is *coerced* and not freely given in response to an unwarned yet uncoercive question.[59] In addition, Justice Brennan's dissent discussed the use of cleansing warnings and considerations of other factors such as proximity in time and place or other intervening factors and criticized the majority for not using those factors to reach their decision.[60]

The Court of Military Appeals in recent years has molded self-incrimination law in the military to follow the fifth amendment decisions of the Supreme Court.[61] In some cases, this has involved overturning long-standing precedents. In *Elstad*, the Court makes it much easier for the government to admit a confession given after an earlier unwarned admission so long as the later confession is given after proper rights warnings and is shown to be voluntary. The Court has rejected the idea that "taint" must be dissipated by looking to intervening factors if the initial improper conduct consists solely of a noncoercive failure to warn. This eliminates barriers that the Court of Military Appeals has imposed for the admission of confessions obtained after unwarned statements. *Oregon V. Elstad* can be easily adapted to military practice and is likely to be adopted by a Court of Military Appeals that seeks to lessen the distinctions in the right against self-incrimination between military and civilian law.

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[58]15 M.J. at 144. The court adopted these factors from an earlier case, United States v. Seay, 1 M.J. 201 (C.M.A. 1975).

[59]36 Crim. L. Rptr. (BNA) at 3171. Of course, one of the rationales for having a separate statutory military right against self-incrimination and separate rights warnings requirements is to overcome the inherently coercive nature of military questioning. Service members are expected to answer questions and to respond to their superiors. Article 31 was enacted at least in part to overcome this coercive atmosphere where the service member was faced with a potentially self-incriminating situation. Defense counsel in the military ought to argue this point in an effort to avoid *Elstad's* holding. Additionally, defense counsel can argue that the military precedents of *Seay* and *Butner* still control until the Court of Military Appeals overrulres them and can contend that military courts are also bound by Mil. R. Evid. 304, which by definition makes "involuntary" those statements obtained in violation of rights warnings and waiver requirements.

[60]36 Crim L. Rptr. (BNA) at 3177-79 (Brennan, J., dissenting).

[61]*See, e.g.*, United States v. Harden, 18 M.J. 81 (C.M.A. 1984); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980).

The Advocacy Section

TRIAL COUNSEL FORUM

Trial Counsel Assistance Program, USALSA

Table of Contents

Tentative dates and sites have been arranged for TCAP regional seminars through September 1986. To facilitate budgetary and administrative planning by staff judge advocates, the anticipated schedule of TCAP seminars is published below:

1985	1986
Aug—Fort Benning	Jan—Fort Gillem
Sep—Ft. Leavenworth	Feb—Fort Carson
Oct—Fort Hood	Mar—Korea/Hawaii
Nov—Presidio of San Francisco	Apr—Fort Ord
	May—USAREUR
Dec—Fort McNair	Jun—Ft. Sam Houston
	Jul—West Point
	Sep—Fort Bragg

This month's *Trial Counsel Forum* features part I of a two-part article which sets forth a methodology for pretrial preparation of child abuse cases. Part I of the article addresses the relationship trial counsel must establish with the medical and social work community to resolve the difficult issues which arise in child abuse cases. Part II of the article will address the administrative and investigative strategies that should be used by trial counsel in child abuse cases and will be published in the June 1985 issue of *The Army Lawyer* in the *Trial Counsel Forum.*

Eye of the Maelstrom: Pretrial Preparation of Child Abuse Cases

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Part I

National attention continues to be riveted on the subject of child abuse. Extreme situations presented in the Jordan, Minnesota, cases in which charges of sexual abuse of children were dismissed against twenty-one defendants "for lack of credible evidence,"[1] and the *McMartin* case, the preliminary hearing is currently being held in Los Angeles, California, where seven defendants are charged with the rape and sexual abuse of forty-one children,[2] graphically illustrate the complexities involved in prosecuting criminal cases where children are victims. In recent years, experts in law, medicine, and sociology have studied, talked about, and written articles concerning child abuse. Child abuse is of continuing interest to the Trial Counsel Assistance Program. Indeed, an entire issue of the *Trial Counsel Forum* was recently dedicated to the issues involved in prosecuting child abuse cases.[3] Why, then, another article concerning child abuse?

Child abuse cases continue to be among the most challenging of criminal cases. Recent decisions in the areas of "uncharged misconduct," "residual hearsay," and the admission of expert testimony on such subjects as "battered child syndrome" and "sexually abused child syndrome" have greatly aided prosecutors in trying cases involving crimes against children. These legal developments coupled with an apparent change in attitude by specialists in medicine and sociology favoring the prosecution of those charged with committing crimes against children have facilitated the prosecution of child abuse cases. Even so, there have been recent allegations that this greater willingness to prosecute such cases has led to a "witch hunt" mentality.[4] The Jordan, Minnesota, cases and other recent cases with similar results[5] have added fuel to this fire. Defense counsel recently have also begun to fan this fire. For example, in the *McMartin* case, defense counsel have asserted that the child psychologists associated with the investigation of the case have "brainwashed" the forty-one child witnesses.[6] While the Jordan, Minnesota, cases and the *McMartin* case have been sensationalized in the news media, they represent the maelstrom which typically exists in criminal cases involving children. This article will focus on that aspect of the cases involving child abuse and will suggest a methodology for pretrial preparation which will help insure an orderly and successful prosecution.

Rule 1: Understand the Framework

Child abuse is a term used to describe a wide range of criminal behavior, including such crimes as murder, rape, aggravated assault, and child neglect. When children become victims of these types of offenses, a chain of events is frequently set in motion which disrupts the victim's life and forecloses a successful prosecution. The following facts, raken from *State v. Middleton*,[7] are an example of such a consequence.

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[1]Lamar, *Disturbing End of a Nightmare: The Scott County sex-abuse cases draw to a confusing close*, Time Magazine, Feb. 25, 1985, at 22.

[2]Green, *The McMartins: The 'Model' Family Down the Block That Ran California's Nightmare Nursery*, Time Magazine, May 21, 1984.

[3]Gravelle, *Prosecution of Child Abusers*, Trial Counsel Forum, July 1984, at 2.

[4]Press, *The Youngest Witnesses*, Newsweek, Feb. 18, 1985.

[5]Washington Post, Mar. 19, 1985, at A1.

[6]Los Angeles Times, Feb. 24, 1985, at B6.

[7]657 P.2d 1215 (Or. 1983).

> The 14-year-old child asserted that her father raped her in the early morning of December 23, 1980. She reported the rape to a friend's mother, to a Children's Services worker, and also to a doctor at the hospital. The following day a police officer recorded her statement at the police station. Within the week she wrote out her statement before testifying before the grand jury.[8]

These are facts which typify cases involving sexual abuse of a child. Similar factual situations arise in cases involving physical abuse of a child. In either case, a substantial number of individuals, agencies, and concerns are introduced into a child's life once a complaint of injury is made. There is a significant danger that the child's ability to be a percipient and cooperative witness will be impaired. Often, as in the *Middleton* case, the following occurs:

> On February 6, 1981, in the presence of her mother, *defense counsel's wife*, and another woman, the child wrote a statement saying she had lied about the rape. In that note she said she had not been raped, but that she had lied so she could 'get out on her own.' She also said she was under a lot of pressure to stick to her original story.[9]

Fortunately, because the prosecutor in *Middleton* was resourceful and convinced the court to allow child psychology experts to testify about the reactions of young victims of familial sexual abuse, the accused was convicted and the conviction was subsequently sustained on appeal. Yet, this is but one success story amidst many which are not so successful.

Unlike criminal cases involving adults, cases involving children have many important and perplexing ancillary issues which cannot be resolved in a criminal court. Resolutions of these issues are frequently sandwiched into ongoing criminal proceedings against the accused, often, rightly, taking precedence. For example, in cases of intrafamily crime, the immediate issue which requires resolution is who is going to care for the child? Beyond this immediate issue is the issue of eventual child custody. No less important is the restoration of the family unit. While these same issues may not be present in cases where the accused is not a family member, the issues regarding the welfare of the child are still present and represent a significant concern, especially when there are indications that protracted criminal proceedings may impair the child's mental health.[10]

Where does a trial counsel begin against this background? Once involved in a criminal case involving a child victim, every trial counsel eventually asks, "Why wasn't I brought into this case sooner?" Even though the early involvement of a trial counsel in a child abuse case adds to the number of people the child has to face, early involvement in the case by trial counsel is absolutely essential. Early involvement, however, requires a full understanding of how these types of cases develop and a plan of action. A basis for accomplishing these requisites for early involvement is found in Army Regulation 608-1.[11]

Chapter 7 of AR 608-1 lists the key persons likely to be involved in a criminal case involving a child victim. Paragraph 7-1 establishes the concept of the Army Family Advocacy Program (AFAP). On Army installations, overall responsibility for the AFAP is assigned to the Chief, Army Community Services.[12] Under the AFAP, primary responsibility for the prevention, identification, evaluation, diagnosis, treatment, disposition, followup, and reporting of child maltreatment is vested in the Family Advocacy Case Management Team (FACMT).[13] Paragraph 7-4*a* of AR 608-1 establishes the makeup of the FACMT and outlines its func-

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[8] *Id.* at 1216.

[9] *Id.* [emphasis added].

[10] A. Burgess, A. Groth, L. Holmstrom, S. Sgroi, Sexual Assault of Children and Adolescents xix (1978).

[11] Dep't of Army, Reg. No. 608-1, Personnel Affairs—Army Community Service Program, (15 May 1983) [hereinafter cited as AR 608-1].

[12] AR 608-1, para. 7-3.

[13] AR 608-1, para. 7-5.

tions. Consequently, because AR 608-1 is the exclusive Army regulation dealing with child abuse, the FACMT represents an ideal framework for developing a comprehensive and cohesive plan for prosecuting criminal cases involving child victims. The responsibility for coordinating this effort should be vested in the local SJA's chief of military justice.

The chief of military justice is in the best position to understand the special problems historically encountered by trial counsel in child abuse cases, to resolve potential conflicts, and to facilitate the mutual interests of members of the prosecution and the FACMT.

As discussed above, the essential starting point is AR 608-1 because it establishes policies which both inhibit and aid the prosecution of child abuse cases. For example, paragraph 7-1 provides that the philosophy of the Army Family Advocacy Program is to treat and rehabilitate the "maltreater" as well as the "individual maltreated." Paragraph 7-3*b* provides that unit commanders are responsible for referring service members "involved in" child abuse to the FACMT. Paragraph 7-5*a* provides that persons who furnish statements in connection with child abuse will, upon request, be granted "confidentiality." Similarly, paragraph 7-5*b* provides that installation child support services, medical personnel, social workers, nurses, and physicians will also, upon request, be granted "confidentiality" regarding information provided concerning child abuse. Lacking proper clarification, these "confidentiality" policies can be easily misinterpreted and misapplied. If so, the consequences would be devastating to the effective investigation and prosecution of a child abuse case. It is obvious that this was not the intent of AR 608-1 because there are other provisions in AR 608-1 which, if strictly adhered to, provide a solid basis for medical identification and evaluation of suspected child abuse.[14] The evidence derived from these requirements would be invaluable to a trial counsel in preparing a child abuse case.

Thus, the parameters drawn by AR 608-1 provide an excellent starting point for formulating unified approaches to child abuse cases. Within the context of a criminal prosecution, terms such as "treatment," "rehabilitation," and "confidentiality" must be mutually understood and defined. Legal issues such as whether medical personnel or social workers should advise suspects of child abuse of their rights as outlined by Article 31 of the Uniform Code of Military Justice[15] likewise should be discussed. As well, the chief of military justice should discuss relevant cases which have used evidence of "sexually abused child syndrome"[16] and "battered child syndrome,"[17] with the FACMT and explain how this evidence has been used in cases involving the sexual abuse and physical abuse of children.

Beyond this starting point, the chief of miltiary justice should ascertain the identity and function of the key members of the FACMT and determine the level of their expertise especially in the areas of child psychology and pediatrics. He or she should examine the procedures established by the FACMT for reporting incidents of child abuse and the approaches that will be taken in cases involving sexual and physical child abuse. He or she should also determine how the team interfaces with local civilian authorities and gain a full understanding of any policies or agreements that have been established with them. Potential areas of disagreement and conflict regarding approaches to the investigation of child abuse cases should be identified. For instance, medical and social work personnel often avoid such "law enforcement activities" as advising suspects of their right against self-incrimination

[14]AR 608-1, para. 7-3*i*.

[15]Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

[16]*See* United States v. Bowers, 660 F.2d 527 (5th Cir. 1981); United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1981); People v. Bledsoe, 681 P.2d 291 (Cal. 1984); Minnesota v. Durfee, 322 N.W.2d 778 (Minn. 1982); Jahnke v. Wyoming, 683 P.2d 991 (Wy. 1984).

[17]*See* United States v. Snipes, 18 M.J. 172 (C.M.A. 1984); State v. Kim, 645 P.2d 1330 (Hawaii 1982); State v. Meddleton, 657 P.2d 1215 (Or. 1983); State v. Carlson, No. C3-84-1779, slip op. (Minn. Ct. App. 1985).

because the advisement is believed to be antithetical to their profession and a stumbling block to treatment. Such beliefs need to be discussed and analyzed. Even if it is determined that such an advisement would not be suitable for members of these helping professions, the resolution of problems that can develop during the prosecution of a child abuse case can be discussed to prevent future, unnecessary legal difficulties.

This approach, whether carried out by the chief of military justice or individual trial counsel, is essential for prosecuting a child abuse case. The primary goal is early notice of a child abuse case. As will be discussed in part II of this article, early notice is vital to minimize the harmful impact upon the victim and to maximize investigational flexibility.

Government Briefs

Do Not Forget the Facts

> The purpose of a hearing is that the Court may learn what it does not know and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts.[1]

Frequently, trial counsel blessed with the security of a pretrial agreement will neglect the stipulation of facts and accept a defense counsel's token effort to draft the stipulation. This is regrettable because not only does a scanty stipulation of facts provide little assistance to the judge in the guilty plea inquiry, it is also of little assistance to the sentencing authority and absolutely precludes any opportunity for effective advocacy. One cannot conduct a searching cross-examination of a character witness or argue vigorously when there is a lack of facts.

Part of the TCAP mission is to examine records of trial for examples of effective advocacy; a glance at the stipulation of fact in a guilty plea case will provide more information about the trial counsel than anything he or she might say on the record.

To prove that contention, you need only examine two stipulations of fact from two very similar cases. The first of these is *United States v. Campbell*[2] which involved an NCO who molested his natural seven year old daughter over a period of time. The other is *United States v. Gomez*[3] which involved an accused who molested his natural daughter for a period of time beginning when she was eight years old. Both fathers attempted rape but neither carried it out, and both engaged in extensive sexual activity short of intercourse. Both cases were guilty pleas. SGT Gomez negotiated a four-year limitation on confinement and SGT Campbell negotiated a thirty month limitation. Both were sentenced by court members.

The stipulation of fact in *Gomez* read:

> It is hereby stipulated by and between the prosecution and the defense, with the express consent of the accused, that the following facts are true:
>
> The accused is and has been continuously a member of the United States Army since 25 September 1975. He has been assigned to various units at Fort Knox, Kentucky since 2 September 1981, during which time he has resided with his family in government quarters at 5339-D Brett Drive, Fort Knox, Kentucky. On 22 April 1982, the accused was discharged and immediately reenlisted for a period of six years.
>
> On 26 October 1981, the accused's wife, was hospitalized for a miscarriage of pregnancy. During her absence, the accused

[1]Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 803 (1951).

[2]United States v. Campbell, CM 444042 (A.C.M.R. 30 Nov. 1983).

[3]United States v. Gomez, CM 446227 (A.C.M.R. 1 Mar. 1985).

decided to gratify his sexual desires by sexual exploitation of his daughter, Emily. He began a course of sexual abuse of Emily that continued into his current enlistment until it was discovered in August 1983. Emily was eight years old when the accused began to use her for his self gratification, and she was ten years old when these crimes were discovered. These offenses were crimes of incest and the accused has not exhibited sexual interest in other children. Prosecution Exhibit 2 is two photographs of Emily at ages eight and ten.

From 22 April 1982 until 29 August 1983, the accused engaged in sexual exploitation of Emily, in which he committed indecent, lewd and lascivious acts upon her on a regular and frequent basis. The opportunity to commit these crimes would arise when her mother was out of the home. On such occasions the accused would frequently order Emily to his bedroom in their Fort Knox quarters. He would remove her clothing and fondle her vagina with his hands. He would remove his clothing exposing his penis to Emily. He would then force her naked body onto his bed and would lie on top of her with his erect penis against her vagina and stomach. He would then rub his penis against Emily's vagina in a humping motion to gratify his lusts and would discharge seminal fluid on her body. Emily was terrified by these acts. She would sometimes resist and beg the accused not to do it to her, but he would insist that she did what he said. He would order her to lie still. When he was finished, he would threaten her not to tell anyone about what he had done, especially not her mother.

Later on during the same period of time, the accused would often undress and fondle Emily to arouse himself and would then force Emily to kneel on his bed on her hands and knees. He would then place his erect penis between her buttocks and thighs from behind, and holding her buttucoks and thighs together with his hands, he would rub his penis between her buttocks against her vagina and anus and would emit seminal fluid on her body to gratify his lusts. Emily would sometimes cry during these sessions, and when she would cry profusely, the accused would sometimes stop and tell her he was sorry.

The accused would commit these criminal acts upon Emily while her mother was out of the house. On one occasion, Mrs. Gomez was going to the commissary with the younger children. Emily pleaded to be taken along. Mrs. Gomez asked Emily why she did not want to stay home. Emily said her daddy was mean to her. On that day, Emily was left home and was sexually exploited by the accused. During the period 22 April 1982 to 29 August 1983, the accused performed these indecent, lewd and lascivious acts upon Emily in excess of 20 times on a regular basis throughout the period. He had been drinking on some occasions and not on others, but he was never so drunk as to not know what he was doing.

On an unknown date in April 1983, while engaged in these acts of sexual perversion, the accused decided to rape his daughter. He undressed her and forced her to lie on the bed on her back. He then spread her legs apart and attempted to penetrate her vagina with his erect penis. Emily was terrified and felt severe pain. She began to cry profusely. The accused then stopped his efforts to penetrate her vagina. He layed on top of her and rubbed his penis against her vagina in his usual manner emitting seminal fluid on her body. At the time of this offense, the accused was not intoxicated and he fully intended to engage in sexual intercourse with Emily by force and against her will.

Following the accused's attempt to rape his daughter in April 1983, he continued to commit indecent, lewd and lascivious acts upon her as he was accustomed to do. During the month of August 1983, the accused and Mrs. Gomez had an argument which led to Mrs. Gomez sleeping downstairs in

their quarters while the accused remained upstairs. During the evening, Mrs. Gomez heard noises coming from Emily's bedroom upstairs. She went upstairs and found the accused in bed with Emily with his leg lying across Emily's body. Mrs. Gomez took Emily downstairs. She later questioned Emily, and Emily reported that the accused had been sexually abusing her. Mrs. Gomez then confronted the accused with Emily's report, but the accused denied doing it. Mrs. Gomez pressed him with the details of Emily's report, and over a period of time, the accused admitted that it was true. Mrs. Gomez then arranged to send Emily to stay with Mrs. Gomez' sister, in Texas.

Neither the accused nor Mrs. Gomez reported these offenses. Mrs. Gomez visited Emily at her sister's home in Texas, during the Christmas holidays in 1983. During her visit, Emily's emotional and psychological problems were evident. Mrs. Gomez asked her sister where Emily could get help. She recommended that Emily be taken to a rape crisis center, and Emily began to receive help.

Females who were sexually exploited as children, as Emily has been, frequently suffer long term psychological and emotional problems which professionals identify as a post-traumatic stress disorder or child sexual abuse syndrome. These problems include fear or distrust, low self-esteem, and self-destructive behaviors.

These women often develop fear or distrust of men. They often experience fear of sexual relationships resulting in illness, vomiting, blackouts, or crying for unknown reasons when attempting sexual intercourse. They frequently become promiscuous or fall into prostitution. They may suffer from confused sexual identity which leads to homosexuality. They often experience a recurring dirty feeling which causes them to bathe or change clothes more frequently.

Their low self-esteem frequently leads to withdrawal of self-isolation, shame and guilt. Victims feel that they are being punished for being bad, that even God doesn't like them, and that they do not deserve anything good. They often develop fear of failure, fear of making new friends, and fear of rejection or desertion. They exhibit a pseudo-maturity in which as children they act more mature than their age.

Victims also exhibit many self-destructive behaviors. They show decreased school performance. They have many illnesses without physical explanation. Many commit suicide. They frequently engage in prostitution, delinquent behavior, drug or alcohol abuse, and early marriage.

Emily Gomez is suffering from a severe post-traumatic stress disorder. As a result of the severe sexual abuse she was suffering, she was withdrawn and performed poorly in school. She went frequently to the school nurse complaining of stomach aches and displayed a pseudo-maturity, acting order than the other nine year old children.

Since being sent to Texas in August 1983, Emily has continued to suffer severe emotional and psychological problems. She feels guilty and believes that everything is her fault. She frequently cries and says she can't forget what her daddy did to her. She very likely will suffer for many years with psychological problems, even with proper counseling, and she may never fully overcome the effects of these crimes. She may be vulnerable to prostitution, promiscuity, and homosexuality. It is extremely unlikely that she will ever enjoy a normal and fulfilling sexual relationship in marriage.

The stipulation of fact in *United States v. Campbell* read:

> The accused is married to . . . and has been married for about ten (10) years. Two children were born of this marriage, JOHN, JR. and CHRISTINA. CHRISTINA is 7 years of age. For approximately two (2)

years ending in mid November, 1982, the accused and his family lived in quarters at . . . .

During the period of approximately March, 1982 until November 8, 1982, the accused has occasion to take indecent liberties with his daughter, CHRISTINA, in that:

> On one occasion during the night, he entered his daughter's bedroom placing his hand on and fondled her genital area for the purpose of sexual gratification.
>
> On a separate occasion his daughter came into the bathroom where he was and he picked her up and for the purpose of sexual gratification, let her slide down so that her genitals came in contact with his, causing his sexual arousal.

Subsequent to all of these occurrences, the child was examined by a physician, such examination revealing that no sexual penetration had occurred.

Staff Sergeant Gomez was sentenced to ten years confinement, reduction to Private E-1, and a dishonorable discharge. Sergeant First Class Campbell was sentenced to confinement for one year and reduction to E-1; he received no punitive discharge.

Change to the 1982 Military Judges' Benchbook

In the June 1984 issue of the *Trial Counsel Forum*, TCAP focused on the standard rape instruction found in the Military Judges' Benchbook.[1] TCAP pointed out that one particular sentence was not mandated by case law or by the Manual for Courts-Martial and could be misunderstood by the court members. The instruction advised: "The victim *must* do what she is able to do, under the circumstances, to prevent the act of sexual intercourse or you *may* infer that she consented. . . ."[2] TCAP proposed the following alternative language: "*If* the victim does not do what she is able to do, under the circumstances, to prevent the act of sexual intercourse, then you *may* infer . . . ." TCAP also proposed the following language: "The victim is *not* required to display any particular level of resistance in order to manifest her lack of consent. . . ."

Change 1 to the Benchbook modifies this instruction and removes the potentially confusing language and adds language which will properly focus on the members' attention on the victim's level of resistance, if any:

> *If a woman fails to make the lack of consent reasonably known by taking such measures of resistance as are called for by* the circumstances, *the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance* would have been useless, or where her resistance was overcome by a reasonable fear of death [or] great bodily harm. You should consider all of the surrounding circumstances in deciding whether the victim consented. . . ."[3]

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[1] Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook, para. 3-89 (May 1982).

[2] *Id.* [emphasis added].

[3] DA Pam 27-9, para, 3-89 (C1, 15 Feb. 1985) [emphasis added to highlight new language].

Military Rule of Evidence 702: A New Frontier for Expert Testimony?

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[1]

Since the adoption of the Military Rules of Evidence, Rule 702 has opened the way for resourceful prosecutors by providing the foundation for admission of expert testimony regarding "rape trauma syndrome,"[2] "battered child syndrome,"[3] and "sexually abused child syndrome."[4] Indeed, this month's Reader's Note, "My Daddy Is a Good Daddy," amply demonstrates the value of Rule 702 to the prosecution. Even so, this is not a rule whose value enures solely to the prosecution; Rule 702 also provides a powerful advantage for the defense. The recent case of *United States v. Downing*[5] provides an example.

In *Downing*, the Third Circuit held that it was error for the trial court to deny the defense an opportunity to introduce the testimony of an expert in the field of human perception and memory on the issue of eyewitness identification. The facts in *Downing* reveal that the accused was convicted of participating in a scheme to defraud vendors by posing as a member of a group called the "Universal League of Clergy" to falsely obtain merchandise credit. The evidence against the accused consisted solely of twelve eyewitnesses who observed "Reverend Claymore" for period ranging from five to forty-five minutes. The accused maintained that he was not Reverend Claymore and that the identifications were unreliable because of the short period of time involved, the innocuous circumstances of the meetings, and the substantial lapse of time between the meetings and the identifications. The trial court ruled that the expert testimony proffered by the defense would usurp the function of the jury because the reliability of eyewitness identification was a matter of common experience which the jury could be presumed to possess. Several federal circuit courts support this view and maintain that expert testimony on the issue of eyewitness perception involves questions that are more adequately dealt with on cross-examination.[6] The Third Circuit, however, disagreed with those circuits, maintaining that other recent decisions by state and federal courts more accurately apply the "helpfulness" test enunciated in Federal Rule of Evidence 702.[7]

As with any novel form of evidence which is the subject of expert testimony, the issue of the admissibility of evidence is founded on its scientific basis. Historically, the test established in *Frye v. United States*[8] has controlled the admissibility of expert testimony and requires that the underlying scientific principle or technique of the expert opinion be generally accepted in the field to which it belongs. In many cases, this meant that expert testimony was admissible only when it had the "aura of infallibility."[9] Since the advent of Rule 702, however, the *Frye* test has eroded, mostly in favor of the prosecution. Yet, trial counsel should take serious note of the *Downing* case and also consider the case of *United States v. Hulen*.[10]

In *Hulen*, the defense attempted to introduce the "expert testimony" of an associate professor of psychiatry concerning an experiment by him on the difficulty encountered by persons of different races in making interracial identi-

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[1]Mil. R. Evid. 702 [hereinafter cited in text as Rule 702].

[2]United States v. Moore, 15 M.J. 354 (C.M.A. 1983).

[3]United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1981).

[4]United States v. Snipes, 18 M.J. 172 (C.M.A. 1984).

[5]753 F.2d 1224 (3d Cir. 1985).

[6]*See, e.g.*, United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

[7]Downing, 753 F.2d at 1230. *See also* United States v. Smith, 736 F.2d 1103 (6th Cir. 1984); State v. Chapple, 660 P.2d 1208 (Ariz. 1983).

[8]293 F. 1013 (C.A.D.C. 1923).

[9]People v. Johnson, 38 Cal.3d 1 (1974). *But see* People v. McDonald, 690 P.2d 709 (Cal. 1984).

[10]3 M.J. 275 (C.M.A. 1977).

fications. The defense submitted that this testimony should be presented to the court members because the victim and the accused were members of different races. On appeal, the Court of Military Appeals held that the trial judge's ruling disallowing this alleged expert testimony was not error because "there was no demonstrable scientific principle as to which [such] expert testimony could be received."[11] Nevertheless, it is reasonable to assume that armed with such holdings as *Downing*, the defense could begin to challenge both in-court and out-of-court eyewitness identifications with "expert testimony" of the kind proffered in the *Hulen* case.

Even though *Hulen* was decided before the adoption of the Military Rules of Evidence, trial counsel may still use it to counter this kind of creative defense effort. *Downing* does not stand for the proposition that Rule 702 is a watershed for every kind of expert testimony. Instead, the Third Circuit held that a substantive inquiry must be conducted before determining the admissibility of novel scientific evidence:

> In our view, Rule 702 requires . . . focusing on (1) the soundness and the reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the research or result to be presented and the disputed facts in the case.[12]

Even so, *Downing* signals caution for trial counsel. It is a strong reminder that new frontiers are open to all pioneers.

[11] *Id.* at 277.

[12] Downing, 735 F.2d at 1237.

Accomplice Testimony

In a recent opinion, the Army Court of Military Review upheld the constitutionality of Fort Jackson Regulation 600-5 which prohibits fraternization.[1] Under the facts of this case, however, the court imposed upon the military judge a *sua sponte* duty to instruct on accomplice testimony. The court found that the fraternization regulation made both the permanent party and the trainee liable for its violation. As a result, the trainee was an accomplice and the court held that an accomplice testimony instruction was required to be given *sua sponte* by the military judge where the government's case was based primarily on the testimony of the trainee-accomplice and was thus pivotal to the case.[2] The court further found that the judge's failure to so instruct was plain error because the court members could have reasonably found that the accomplice's testimony had little corroboration and was, in fact, self-contradictory, uncertain, and improbable.

If you are trying this type of fraternization case, be sure the military judge gives the appropriate accomplice instruction. In determining the appropriate instruction, trial counsel should note that the *Military Judge's Benchbook*[3] provides two possible accomplice instructions: one advising the fact-finders of the questionable integrity of accomplices and the need to weigh their testimony with great caution, and the other advising of the need for corroboration where the accomplice testimony is self-contradictory, uncertain, and improbable. The *former* instruction should be given in all cases where accomplice testimony is presented.[4] The latter instruction is required only where an issue is reasonably raised concerning whether

[1] United States v. Adams, SPCM 20649 (A.C.M.R. 21 Mar. 1985).

[2] *Id.* slip op. at 4; Dep't of Army, Pamphlet No. 27-9, Military Judge's Benchbook, para. 7-10 (C1, 15 Feb. 1985) [hereafter cited as DA Pam 27-9].

[3] DA Pam 27-9, para. 7-10.

[4] United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985); United States v. Rehberg, 15 M.J. 691 (A.F.C.M.R. 1983); United States v. McPherson, 12 M.J. 789 (A.C.M.R. 1982).

the accomplice's testimony is self-contradictory, uncertain, and improbable.[5] For this reason, trial counsel should oppose this latter instruction where there is no issue concerning the consistency, probability, and certainty of the accomplice's testimony.

[5]Indeed, this latter instruction was deleted in the Manual for Courts-Martial, United States, 1984. *Compare* MCM, 1984, R.C.M. 918(c) discussion *with* MCM, 1969, para. 74*a*(2). Furthermore, accomplice instructions have been criticized by the courts. In United States v. Lee, 6 M.J. 96, 98 (C.M.A. 1978) (Fletcher, C.J., concurring), then Chief Judge Fletcher wrote, "I am convinced that an instruction on the testimony of an accomplice should not be given, requested or not. I believe it is improper to call attention to the testimony of any witness. A general instruction is mandated as to the test of the credibility of all witnesses."

Reader's Note

TCAP Note: The following reader note submitted by Captain Denise Vowell, Chief, Criminal Law Branch, Fort Bliss, Texas, is an example of trial preparation and execution at its best.

"My Daddy Is a Good Daddy"

Like many other jurisdictions, civilian and military, Fort Bliss, Texas, has experienced a tremendous increase in the number of cases involving the sexual abuse of children. In one recent case, we successfully used expert testimony from health care professionals on both the merits and on sentencing.

The accused pleaded guilty to indecent acts with four little girls (including his natural daughter). He pleaded not guilty to a fifth specification also alleging indecent acts with a child (Danielle). During trial, it became obvious that the defense theory was that Danielle was making up the incident charged; the evidence in support of this theory being the accused's plea of guilty to the four other specifications of indecent acts with a child.

The merits of the government's case consisted of the testimony of Danielle, a ten-year-old girl, and Danielle's mother, to whom Danielle had reported the incident between four and six months after the actual incident; the incident having occurred nearly two years before the trial. After Danielle and her mother testified, the government called Major Barbara Parry, a psychiatric nurse, to testify. Major Parry had lectured and written about the victims of sexual abuse, but had not previously consulted with Danielle. Before Major Parry testified, the defense objected, arguing that Major Parry's testimony was improper "bolstering" of a witness whose credibility has not been attacked. The government response was that under Military Rules of Evidence 702 and 703,[1] Major Parry could be qualified as an expert and that her testimony could aid the members in deciding the case. On *voir dire*, the members had denied any experience in the area of sexual abuse of children. Further, many of the same panel members had heard another sexual abuse case, one in which the abuse had been promptly reported. Trial counsel argued first that in the members' common experience crimes are promptly reported; second, although "fresh complaint" instructions are no longer given, it would be natural for the members to consider the lack of fresh complaint in evaluating the case; and third, since the defense theory was that the incident had never happened, the lack of outcry arguably confirmed this position.

The military judge permitted Major Parry to be called, but after preliminary questions establishing her expertise, limited her testimony to three areas:

> Is it common for child victims to delay in reporting the incident?

[1]Mil. R. Evid. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Is it common for children to feel guilty about being molested? and

Is it common for children to feel they did something wrong when reflecting on the incident?

The accused was convicted of sexually abusing Danielle. On sentencing, the government introduced the testimony of a counselor who had been treating two of the victims. The counselor testified, over defense objection, that the girls were distrustful of men, and that one of the victims had stated, "My daddy's a good daddy, 'cause he just watches TV and doesn't pay any attention to me and my friends." Additionally, the testimony of Lieutenant Colonel (Dr.) Aldridge, Chief of Social Work Services and founder of the United States Disciplinary Barrack's treatment program for sex offenders was introduced. LTC Aldridge testified about types of pedophiles, the type of treatment needed, the treatment provided at the United States Disciplinary Barracks, and the period of time needed for treatment. The defense also objected to this testimony. In countering these objections, trial counsel argued that Rule for Courts-Martial 1001[2] permitted evidence of rehabilitative potential, and that because *United States v. Garcia*[3] indicated that individual deterrence evidence and argument was permissible, such testimony was admissible. These arguments proved to be successful.

The accused was sentenced to a dishonorable discharge, confinement for five years, and reduction to E-1.

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[2]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001.

[3]18 M.J. 716 (A.F.C.M.R. 1984).

THE
ADVOCATE FOR
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Submitted by the United States Army Defense Appellate Division

An Overview of the Military Justice Act of 1983 Advisory Commission Report

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I. Introduction

This article will present an overview of the Military Justice Act of 1983 Advisory Commission Report (Report). The Advisory Commission was formed to study issues which were too controversial to be included within the Military Justice Act of 1983.[1] The Report contains seven major issues studied by the commission and

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[1]The Military Justice Act of 1983 Advisory Commission Report Pursuant to 10 U.S.C. § 867(g) vol. 1 (Commission Recommendations and Position Papers) p. iii (1984) [hereinafter cited as Adv. Comm. Rep.].

their recommendations thereon. The recommendations are on the cutting edge of future changes in the military justice system and the Uniform Code of Military Justice. These possible changes are important to all military justice practitioners because the seven issues contained in the Report go to the foundation of the military justice system. The possible changes may chart new directions in the administration of military justice. Deciding which of the proposed changes should be implemented depends upon whether the military justice system is viewed as primarily a system of justice or primarily as a disciplinary system. Or, if viewed as both, what combination of justice and discipline. Defense counsel necessarily have a unique view of the military justice system and their views are often at odds with those of trial counsel, judges, and staff judge advocates concerning desirable changes in the military justice system.

II. Background

The Report itself consists of four volumes, for a total of 2500 pages:

Volume I: Commission Recommendations and Position Papers

Volume II: Transcript of Commission Hearings

Volume III: Survey of Convening Authorities and Military Justice Practitioners, Survey Description and Analysis

Volume IV: Public Comments Miscellaneous Documents and Statistics

Congress, through the Military Justice Act of 1983,[2] directed the Secretary of Defense to establish a commission to study and make recommendations to Congress regarding several specified matters related to the military justice system;[3] the Military Justice Act of 1983 Advisory Commission was established by the Secretary of Defense to conduct that study. The commission was composed of nine members: five senior judge advocates with expertise in military justice from the military services, a staff member of the United States Court of Military Appeals, and three civilian attorneys recognized as experts in military justice or criminal law.[4] Writing the Report took nearly a year and exhaustive efforts were made to reach interested individuals, to solicit their views. Some of the groups who commented included the American Civil Liberties Union, the American Law Institute, and the National Center on State Courts. A list of sources the commission solicited appears in Volume IV of the Report.

The seven issues which the commission ultimately made recommendations on were:

(1) Whether the sentencing authority in court-martial cases should be exercised by a military judge in all non-capital cases to which a military judge had been detailed.

(2) Whether military judges and the Courts of Military Review should have the power to suspend sentences.

(3) Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year, and what, if any, changes should be made to current appellate jurisdiction.

(4) Whether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure.

(5) What elements should be contained in a fair and equitable retirement system for the judges of the United States Court of Military Appeals.[5]

(6) Whether the United States Court of Military Appeals should be an Article III Court under the U.S. Constitution.[6]

[2]Pub. L. No. 98-209, 97 Stat. 1393 (1983).

[3]Pub. L. No. 98-209, § 9 (b)(1).

[4]Adv. Comm. Rep. vol. 1 p. 1.

[5]*Id.* at p.3.

[6]*See generally* Everett, *Some Observations on Appellate Review of Court-Martial Convictions—Past, Present and Future*, 31 Fed. B. News & J. 420, 421 (1984).

(7) Whether the membership of the Court of Military Appeals should be increased from three to five judges regardless of which Article of the Constitution the Court is constituted under.[7]

The commission concluded that the present military justice system is well suited to achieving the objective of just results in individual cases while also fulfilling the military necessities of mission readiness and good order and discipline.[8] Furthermore, all the groups which the commission contacted expressed confidence in the system, including commanders, staff judge advocate, trial counsel, defense counsel, and judges.[9] This positive view of the military justice system produced the feeling among some observers that an effective and working system ought not be disturbed.[10] The commission was sensitive to these concerns and examined the proposed changes to determine the possible advantages of change against the merits of the current system and their desire to avoid change merely for the sake of change.[11] Additionally, the very issues that the commission studied were the very proposals specifically excluded from the Military Justice Act of 1983 because of their controversal nature.

III. Issues Studied

1. Whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge had been detailed.

A. Advantages of Retaining the Member Sentencing Option

The commission received no persuasive evidence that sentencing by a judge produces more consistent sentences than sentencing by court members for similarly situated accuseds.[12] Also, military personnel have long enjoyed a right to elect sentencing by members and many do.[13] Removing this option would deprive many of a valuable option and would be a step backwards from the significant gains first obtained with the enactment of the Uniform Code of Military Justice over thirty years ago.

The commission also recognized that sentencing by members is an important area where the nonlegal military community becomes involved in the military justice system.[14] Participation in courts-martial by nonlegal personnel develops a respect for and knowledge of the system.[15] Lieutenant General Jack Galvin, Commanding General of VII Corps in his statement to the commission, said:

> Court member duty, to include determination of an appropriate sentence by officers and, where requested, enlisted personnel, is an important duty which benefits the Army as a whole. The fundamental fairness which is a characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom.[16]

The commission agreed with General Galvin's statement and added that sentencing by members provides important feedback to military judges concerning the values and needs of a particular military community.[17] Finally, the commission noted that under present rules of evidence, members are likely to have the same information before them as the military judge.

B. The Advantages of Judge Alone Sentencing

The commission pointed out that most civilian jurisdictions have abandoned jury sentencing in noncapital cases and have adopted judge alone sentencing.[18] All but seven states rely on

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[7]Adv. Comm. Rep. vol. 1 p. ii.

[8]*Id.* at p. 6.

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.* at p. 7.

[13]*Id.*

[14]*Id.* at p. 8.

[15]*Id.*

[16]*Id.*

[17]*Id.*

[18]*Id.* at p. 9.

judicial sentencing. Indeed, the Senate Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, which authorized the formation of the commission, found that in the federal civilian system the judge is responsible for sentencing in all cases, even those in which the guilt or innocence of the accused is determined by the jury.[19]

Other reasons used to urge the adoption of judge alone sentencing were that the military judge would be more concerned about inequality of sentences and the appearance of unfairness that may result, the military judge is less likely than members to be affected when sentencing by a concern about what others will think of the sentence, the military judge would be better able to handle volatile information than court members, and, finally, that many accused elect judge alone trials.[20]

C. The Commission's Recommendation

The commission recommended that the proposal not be adopted for three reasons. First, the present procedure of allowing the accused the option of trial by court members or by military judge alone has served the military justice system well and no compelling reasons exist for such a change.[21] Second, the present options allows for the participation of military members in the court-martial punishment decision.[22] Finally, the present system fosters an understanding of the military justice system by all service members and a belief in the fundamental fairness of the system.[23] Two commission members, Mr. Sterrit and Mr. Ripple, dissented.

2. Whether military judges and the courts of military review should have the power to suspend sentences.

A. The Disadvantages of Suspension Power

On this issue, the commission clearly indicated that the military justice system was fundamentally different than the civilian system because of its need to instill discipline and fulfill its mission of national defense.[24] The commission pointed out that decisions to retain or discharge a person have enormous impact on a command and that these decisions are crucial to commanders who are resposible for morale and mission readiness.[25] The commander, when called upon to make such decisions, may have access to information and opinions that are unavailable to courts and that might not be admissible even if available.[26] The commission also pointed out that nothing would be more disruptive to a command than to have a judge suspend a discharge where the commander for good reason decides that the convicted person should be removed from the unit.[27]

Major General Robert C. Oaks, Director of Personnel Plans, United States Air Force, and a former convening authority, said in his statement to the commission:

> Military judges are not in a position to assess the effect on discipline, morale and good order that retaining a convicted military member would have on the command. Only the commander can determine this. As opposed to civilian court jurisdictions, the military judge does not exercise supervisory control over the member serving a suspended sentence or over the person administering the convicted member's probation. This is the responsibility of the commander and, as such, only the commander should have the authority to suspend sentences. Specifically, in the civilian community as opposed to military, there is not a single person responsible for the overall conduct of life and good order and discipline such as the commander, and so the commander possesses an option, an

[19] S. Rep. No. 53, 98th Cong., 1st Sess. 31 (1983).

[20] Adv. Comm. Rep. vol. 1 p.9.

[21] *Id.* at p. 10.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at p. 11.

opportunity, that is not available in civilian jurisdictions.[28]

B. The Advantages of Suspension Authority

The advantage cited by the commission for placing authority to suspend in the hands of the military judge was that this would be consistent with the way most civilian jurisdictions proceed.[29]

C. The Commission's Recommendation

The commission recommended that the proposal not be adopted for several reasons. Most importantly, commanders would resent a binding decision by a military judge to suspend a discharge that commanders want enforced.[30] The commission also stated that commanders would see this as an interference with command decisions, and their perception would not be unreasonable.[31] Two commission members, Mr. Youngman and Mr. Ripple, dissented from this recommendation.

3. Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement for up to one year, and what, if any, changes should be made to current appellate jurisdiction.

A. The Advantages of Expanding Jurisdiction

Expanding the jurisdiction of special courts to include confinement for up to one year would conform to the misdemeanor-felony line drawn by federal law and by many states.[32] Since the six month limitation on special courts was established at a time when the accused had fewer procedural rights and when lawyers were not involved in the trial as they are now, this jurisdictional expansion does not mean that an accused will receive less protection than in the past.[33] For some cases, an accused might benefit if the special court is permitted to impose more than six months punishment.[34] Also, the data in the Report indicated that this proposal received the strongest support of any of the proposals from military justice practitioners from all services.[35]

B. Countervailing Considerations

Expansion of the jurisdiction might result in "sentence inflation"—an overall rise in the length of incarceration because of the increase in the maximum imposable sentence.[36] The commission also stated that, in many cases, to increase special court jurisdiction would result in an accused not getting the benefit of an Article 32 investigation, a minimum of five court members, a verbatim record of trial, and other rights accorded at a general court-martial.[37] Also, the spectre of under-utilization of general courts-martial disturbed some commission members. This under-utilization or under-referral problem was one expressed by many of the witnesses to the commission hearing, including Brigadier General Donald W. Hansen, Assistant Judge Advocate General for Military Law.[38] Under-utilization of general courts-martial was seen as a possibility because convening authorities would refer cases to more efficient special courts rather than general courts.[39]

C. The Commission's Recommendation

The commission recommended adoption of the proposal and further recommended that if the confinement jurisdiction of the special court-martial was increased to one year, there be a provision that a military judge and a cer-

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[28] *Id.*

[29] *Id.* at p. 12.

[30] *Id.*

[31] *Id.*

[32] *Id.* at p. 13.

[33] *Id.*

[34] *Id.*

[35] *Id.* at vol. 3 (Survey of Convening Authorities and Military Justice Practitioners) p. 37.

[36] *Id.* at vol. 1 p. 13 and vol. 3 p. 38.

[37] *Id.* at vol. 1 p. 13.

[38] *Id.* at vol. 2 (Transcript of Commission Hearing) p. 78.

[39] *Id.* at vol. 1 p. 14.

tified defense counsel be detailed to every special court-martial in which confinement in excess of six months might be adjudged.[40]

The commission felt that this change would simplify the court-martial process and increase the understanding of the military justice system. The changes would bring the distinction between general and special courts-martial more into line with the civilian distinction between felony and misdemeanor cases in the civilian sector.[41]

The goal of making the military justice system understandable was expressed by Lieutenant General Galvin when he testified before the commission. When speaking of the Uniform Code of Military Justice, he said:

> The Code is not military jargon. The Code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say, and you see in my questionnaire, that given the exigencies of military service, we have to approach the daily run of the mill American system of justice as closely as we can.[42]

Two commission members, Mr. Ripple and Mr. Sterrit, dissented from the commission's recommendations.

4. Whether military judges, including those presiding at special and general courts-martial and those sitting on the courts of military review, should have tenure.

A. The Disadvantages of Tenure

The main disadvantage of tenure pointed out by the commission is military judges, as military officers, already enjoy substantial independence in the discharge of their duties.[43] The commission reviewed the adoption of tenure as a solution to a perceived problem when there is, in fact, no problem at all.[44]

B. The Advantages of Tenure

The main arguments for tenure focus on the fact that a guaranteed term of office would preclude any appearance of influence of judicial decisions.[45] Mr. Eugene Fidell, a spokesman for the American Civil Liberties Union, had been the chief proponent of the idea of tenure for military judges in earlier congressional hearings, and his views also were solicited in the Public Comments Section of the Report.[46]

C. The Commission's Recommendations

The commission recommended that tenure for military judges not be adopted. The two main reasons for this recommendation were that judges are now independent and creating a system of tenure would suggest that the system does not currently operate as an independent judiciary.[47] Three commission members, Mr. Honigman, Mr. Sterritt, and Mr. Ripple, dissented from this recommendation.

5. Whether the United States Court of Military Appeals should be an article III court under the United States Constitution.

A. The Advantages of Article III Status

The commission cited three principal reasons why the Court of Military Appeals should be made an article III court: independence of the court, prestige of serving on the court, and personnel recruitment and retirement concerns.[48] The commission seemed convinced that no financial package could overcome the absence of article III status.[49] The commission also felt that Congress has the power to make the court

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[40] *Id.*

[41] *Id.*

[42] *Id.* at pp. 14-15.

[43] *Id.* at p. 15.

[44] *Id.*

[45] *Id.*

[46] *Id.* at vol. 4 (Public Comment, Miscellaneous Documents & Statistics) p. 7. *See* Senate Armed Services Committee, *Military Justice Act of 1982, Hearings Before the Subcomm. on Manpower and Personnel*, 97th Cong., 2d Sess. 79, at 225, 242-44, 248 (1982).

[47] Adv. Comm. Rep. vol. 1 p. 16.

[48] *Id.* at p. 17.

[49] *Id.*

an article III court, citing *Glidden v. Zdanok.*[50] *Glidden* held that the Court of Claims and the courts of patent appeals were validly constituted under article III.

B. The Disadvantages of Article III Status

The commission then questioned the effect of a change in status from article I to article III status. The commission agreed that although such a change would resolve the court's independence, prestige and retirement concerns, the change might cause a problem by expanding the court's jurisdiction.[51] Specifically, the commission was concerned whether a reformed article III court would gain jurisdiction over administration discharge matters and nonjudicial punishment under Article 15 of the Uniform Code of Military Justice.[52] Chief Judge Robinson O. Everett of the Court of Military Appeals has written persuasively in favor of giving the court article III status and expanding its jurisdiction to include administrative actions.[53]

C. The Commission's Recommendation

The commission recommended adoption of the proposal with the caveat that legislation expressly limit the jurisdiction of the court and that specific language be included in the legislation to preclude the court's exercise of jurisdiction over nonjudicial punishment actions and over administrative discharges.[54]

Three commission members, Captain Byrne, Colonel Mitchell, and Colonel Raby, dissented from the commission's recommendation.[55]

6. What elements should be contained in a fair and equitable retirement system for the judges of the United States Court of Military Appeals.

A. The Effect of Article III Status

If Congress approves article III status for the Court of Military Appeals, the judges would be covered under the same retirement system now covering all other federal judges.[56]

B. The Commission's Recommendations (Based On The Assumption That The Court of Military Appeals Does Not Become An Article III Court).

The commission recommended adoption of the retirement plan now held by US Tax Court judges.[57] The Tax Court was chosen as the appropriate model to emulate because the Tax Court judges also serve fifteen year terms.[58] The commission felt that the key to reform in this area was to assure judges and prospective judges that they will be treated fairly in a system that does not guarantee reappointment after a fifteen year term is served.[59]

Three commission members, Captain Byrne, Colonel Mitchell and Colonel Raby, proposed different retirement systems than the Tax Court plan.

7. Whether the membership of the Court of Military Appeals should be increased to five judges.

The commission on its own accord[60] unanimously recommended increasing the membership of the Court of Military Appeals from three to five members.[61] The three main reasons for these changes were longevity of precedents, predictability of future decisions, and efficiency of case resolution.[62] The three-judge panel system creates problems because when one judge leaves the court, dramatic shifts in philosophy can occur.[63] Also, a five judge court

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[50]370 U.S. 530 (1962).

[51]Adv. Comm. Rep. vol. 1 p. 19.

[52]*Id.* at p. 20.

[53]Everett, *supra* note 6, at 422.

[54]*Id.*

[55]Adv. Comm. Rep. vol. 1 p. 21.

[56]*Id.*

[57]*Id.*

[58]*Id.*

[59]*Id.*

[60]This issue was not specified in the original five issues that the commission was directed to study under the Military Justice Act of 1983 or the sixth issue which was specified for study by the House Armed Services Committee.

[61]Adv. Comm. Rep. vol. 1 p. 22.

[62]*Id.*

[63]*Id.* at p. 23.

would bring the court's membership in line with the American Bar Association Commission on Standards of Judicial Administration which recommends that a jurisdiction's highest appellate court should have not less than five or more than nine members.[64]

IV. The Possibility of Change From a Defense Perspective

Given the recent changes the military justice system has undergone with the passage of the Military Justice Act of 1983 and the resulting 1984 Manual for Courts-Martial, it is unlikely the proposals concerning sentencing, expansion of jurisdiction, and judicial tenure will be enacted in the near future. As to the questions regarding article III status and retirement reform for the Court of Military Appeals there is some possibility that these issues will be studied by Congress in the future, especially since the current Chief Judge, Robinson O. Everett, has gone on record as being in favor of both issues.[65] The final issue, which was posed by the Commission itself, that of increasing the Court of Military Appeals' membership from three judges to five judges has merit, but with the current fiscal situation it is unlikely that such a proposal would receive serious consideration in the near future.

The issues involving trial matters directly affect trial practitioners; the balance of this article will discuss the possible changes from a defense viewpoint. The issue of whether the sentencing authority in courts-martial should be exercised solely by a military judge in all non-capital cases is one which defense counsel soundly opposed. Defense counsel from all the services were surveyed by the Commission.[66] Only 33% of defense counsel service-wide and 31% of defense counsel Army-wide favored mandatory sentencing at trial by a military judge alone.[67] Interestingly, on this issue, convening authorities agreed with defense counsel in rejecting military judge alone sentencing. Only 33% of convening authorities service-wide and 31% of convening authorities Army-wide favored such a plan.[68] Defense counsel apparently wish to preserve the option of having two types of sentencing authorities available. Convening authorities presumably want to keep the current sentencing system to allow the military community's participation and education in the military justice system. Defense counsel should, therefore, take note that on particular issues they may have very powerful allies that will support them for reasons different than the defense viewpoint.

The second issue, whether or not military judges and the courts of military review should have the power to suspend sentences was one which 76% of defense counsel service-wide favored.[69] All other groups, *i.e.*, convening authorities, staff judge advocates, military judges, court of military review judges, and trial counsel, all voted overwhelmingly to keep the current system. Defense counsel would like the opportunity to convince the military judge in person that their client is worthy of a suspended or reduced sentence. The current system limits the defense counsel seeking a suspended sentence to submitting a written *Goode* response or a petition for clemency to the convening authority. A more compelling case can generally be developed before the military judge in person where the judges sees and hears the witnesses rather than with a written report. The proposal to give military judges power to suspend sentences would give defense counsel two opportunities to seek a suspended sentence. However, this proposal does not seem to have much chance of success in the near future.

As to the third issue, whether the jurisdiction of special courts-martial should be expanded to permit adjudgement of sentencing including confinement for up to one year, defense counsel of all services favored no change in the current system, with 55% voting against an in-

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[64] *Id.*

[65] Everett, *supra* note 6, at 421-22.

[66] Adv. Comm. Rep. vol. 3 p. 15.

[67] *Id.*

[68] *Id.*

[69] *Id.* at pp. 27-28.

crease in the jurisdiction of special courts.[70] Defense counsel from the Army, however, favored such an increase, with 56% voting to increase the jurisdiction of the special court-martial.[71] Evidently, defense counsel in the Army felt, by at least a narrow margin, that the increase in special court-martial jurisdiction may help some of their clients' cases to be referred to special courts rather than general courts, perhaps in drug cases involving relatively small amounts. As pointed out by the commission, special courts-martial before the 1969 Manual for Courts-Martial did not regularly have trained judge advocates or military judges in every case and this fact was one of the major reasons that the six month jurisdictional limitation on confinement and other limitations were adopted. At the present time, the accused before a special court levels enjoy both a relatively strong limitation on the sentence while at the same time benefiting from representation by trained defense counsel.

Even though the commission did recommend that this proposal be accepted, defense counsel service-wide rejected any change in the jurisdiction of the special court-martial. Any change in the special court-martial jurisdiction would likely find many members of Congress similarly opposed. Defense counsel could find that they might also find strong allies in The Judge Advocates General of the various services who might be worried about the under-referral problem. From the defense viewpoint, this proposed change represents an unknown quantity. It could benefit or harm accused depending on how the change is utilized.

As to the issue of tenure for all military judges, including those sitting on the courts of military review, defense counsel found strong support from military judges, courts of military review judges, and trial counsel.[72] Defense counsel were the strongest supporters of this issue, with defense counsel service-wide giving this measure a 78% approval rating. Defense counsel, like the other groups who agreed with them; trial and court of military review judges and trial counsel, believe that there are subtle pressures involved in being a judge. Specifically, the awareness that a judicial decision might have an adverse affect on future assignments may exert pressure to reach a noncontroversial result. Whether or not judges actually are vulnerable to career or command pressure, the perception or appearance of vulnerability is a problem for defense counsel.

V. Conclusion

When possible changes in the military justice system are discussed in the future, the Military Justice Act of 1983 Advisory Commission Report will be considered a definitive study in the area. Defense counsel, if asked to participate formally or informally in a future review of the military justice system, can learn from the Report how changes may benefit or harm military accused and where they might find unexpected support for defense positions while gaining a thorough knowledge of opposing positions. Defense counsel favor the position that the military justice system should be primarily a system of justice and support changes in the system which will increase the likelihood of a just result for the individual accused.

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[70] *Id.* at p. 37.

[71] *Id.*

[72] *Id.* at p. 5.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Adjustable Rate Mortgage (ARM) Booklet

The Mortgage Bankers Association has published a free consumer booklet entitled, "What You Should Know About ARMS." Designed to provide a common sense explanation of the ARM concept, the guide includes questions a consumer should ask when buying an ARM; a checklist to take to lenders to allow comparisons among mortgages; a discussion of conditions where an ARM may work well; a glossary of ARM terms; examples of different types of ARMs; and advice regarding particular features of ARMS.

For a free copy, write to: ARMS Brochure, P.O. Box 65081, Washington, D.C. 20035.

Property Transfers Between Spouses

The Tax Reform Act of 1984 simplified the tax considerations when spouses or former spouses transfer property incident to divorce. Under the new law, any transfer of property after 18 July 1984, if made between spouses or between former spouses if incident to divorce, is treated as a gift. This means that if the property had appreciated, the transferor would not incur any liability for capital gains tax. The transaction would be treated as a gift and the transferee would receive the property with the transferor's basis, *i.e.*, carryover basis. Although this rule is generally beneficial and simplifies the tax considerations involved, it does not eliminate them entirely.

Because the transfer is treated as a gift and the transferee receives the property at the carryover basis, the transferee may later become obligated for capital gains tax and recapture of investment tax credits or accelerated depreciation if the transferee disposes of the property. For example, if a husband transfered stock which he had purchased years ago for $1,000 to his wife pursuant to a divorce, and at the time of the transfer the stock was worth $11,000, the wife would receive the stock with a basis of only $1,000. If the wife later wanted to sell the stock, she would be responsible for paying tax on the $10,000 gain ($11,000-1,000).

Legal assistance officers who counsel clients concerning property settlements should make their clients aware of the problem. Additionally, when valuing property for distribution purposes, the parties may want to factor in the tax consequences of a later disposition of the property, if that is contemplated. In our example, if the wife were to immediately sell the stock, although she would receive the $11,000 from the sale, her actual proceeds would be reduced by the amount of the capital gains tax. This would be a long term capital gain so the wife would only have to pay tax on 40% of the gain, or $4,000. That, however, is still significant and should be realized by the parties. The consequences become more serious if the property had been depreciated under the Accelerated Cost Recovery System because some of the gain will be subject to recapture as ordinary income. Recent cases have recognized that in appropriate circumstances, courts should take the tax consequences of a future disposition of the property into consideration. *See Balogh v. Balogh*, 356 N.W.2d 307 (Minn. App. 1984).

Security Deposits

As the moving season approaches, legal assistance officers should be pursuing a vigorous preventive law program. Obtaining return of security deposits is a recurring problem. Prevention of this problem should begin before the lease is initially signed. Housing referral offices should prominently display a sign advising patrons to take their lease to the legal assistance office prior to signing it so that it can be reviewed by an attorney. Attorneys reviewing the leases should make certain that the advanced payment called for by the lease is a security deposit. Although most jurisdictions favor interpreting any advance payment clause as a security deposit, legal assistance officers

should be cautious and carefully review the provision. If the language is clear enough, some jurisdictions would permit the landlord to characterize the advance payment received from the tenant as additional consideration for making the lease or as a liquidated damages clause which could be kept in full by the landlord if the tenant breaches the agreement in any way, regardless of the amount of actual damages.

Tenants who are preparing to occupy a rental unit should anticipate having to later prove that they left the tenancy in about the same condition it was in when they received it, except for fair wear and tear. It is wise to conduct an inspection of the premises with the landlord and complete an accurate and detailed statement of the condition of the tenancy. Any damage to the tenancy should be clearly noted. The tenant may also want to take a photograph of the existing damage or have an independent party examine it. When tenants prepare to vacate the tenancy, they should conduct a final inspection with the landlord and obtain a statement of any discrepancies.

Most states have passed statutes which detail the rights and obligations of the parties concerning security deposits. Most states require the landlord to either return the deposit in full or provide the tenant with an itemized listing of any amounts withheld within one month of the tenant terminating the tenancy. To invoke his or her rights, the tenant may have an obligation to make a written demand for return of the security deposit and to furnish the landlord with a forwarding address. This demand and notice should be made in a manner which provides the tenant with proof of the date the demand was made, *e.g.*, sending the notice by registered mail, return receipt requested. If the landlord fails to return the security deposit or make an itemized accounting of the amount withheld within the time allotted by statute, the landlord, in some jurisdictions, will forfeit his or her right to withhold any of the security deposit even if the tenant caused some damage. Many state statutes provide for attorney's fees and punitive damages for wrongful withholding of the security deposit. A 1983 case awarded treble damages to a tenant whose landlord withheld the security deposit in violation of the state statute, even though there was no showing that the landlord did so in bad faith. *Mellor v. Berman*, 390 Mass. 275, 455 N.E.2d 907 (1983). Some state statutes also require the landlord, at the time the landlord returns the security deposit, to pay interest on the security deposit for the period of time it was in the landlord's possession.

Through proper and timely advice, legal assistance officers can help clients get prompt return of their security deposits. When the security deposit is wrongfully withheld, legal assistance officers can assist the client in documenting the facts which can be turned over to a private attorney for resolution. Often statutes will provide for attorney's fees so that the client will not have to fund the cost of a suit. State statutes vary considerably and legal assistance officers should review the provisions for security deposits in their respective jurisdictions.

The "Affadavit of Right" In Small Estates

Captain Jerry A. Lawson, the Post Judge Advocate at Sierra Army Depot, Herlong, California, frequently counsels clients on estate matters pertaining to California law. He provided the following information on the California "Affadavit of Right" which can be a useful tool for small estates:

Probate of California estates can be an expensive, time-consuming process. Fortunately, California law provides a simplified statutory alternative which applies to many small estates, called the "affadavit of right" procedures. This procedure can be extremely useful for military legal assistance attorneys when advising California clients of modest means.

Affidavits of right are authorized by California Probate Code § 630. The purpose of the affadavit is to allow inheritors of qualifying small estates to obtain their inheritance without probate. The mechanism's utility is a function of its simplicity: the beneficiary merely presents the affidavit to the person or beneficiary in possession of the decedent's assets,

along with a copy of any will the decedent may have left. According to section 631, the transferor need not make any inquiry "into the truth of any of the facts stated in the affidavit," and any transfer in reliance on the affidavit "shall fully discharge [the transferor] from further liability".

Affidavits of right may be filed when any person or persons in the following categories (either taking by will or intestate succession) are entitled to all of the decedent's estate:

a. The surviving spouse;

b. Children;

c. Lawful issue of deceased children;

d. Parents;

e. Brothers and sisters;

f. Lawful issue of deceased brother or sister;

g. Guardian, conservator, or trustee of any person listed above;

h. Beneficiaries under the decedent's will regardless of whether related to the decedent.

To qualify to use an affidavit of right, the estate must have a net value of less than $60,000 and there must be no real property in the state of California. The following items are not considered in calculating the $60,000 amount:

a. Motor vehicles, mobile homes or commercial coaches;

b. Any amounts due the decedent for service in the U.S. armed forces;

c. Any salary due the decedent up to $5,000;

d. Any property held by the decedent:

(1) As a joint tenant;

(2) As a life estate holder;

(3) As community or quasi community property which passed to the decedent's surviving spouse under Section 649.1 of the Probate Code.

This last provision is extremely important for estate planning purposes. Many moderately large estates may fall below the $60,000 limit by taking advantage of joint tenancy arrangements, *inter-vivos* trusts, or other devices which have the effect of reducing the size of the decedent's estate.

The California Department of Motor Vehicles will accept affidavits of right to issue new motor vehicle titles, although to issue the new documentation, the original certificate of ownership, the registration card, and usually a smog control card will be required. Section 9916 of the California Vehicle Code discusses the procedure to follow for boat title transfers.

State Bar Residency Requirements Stricken

In a case which could have an impact on military attorneys, the Supreme Court struck down rules of the New Hampshire Supreme Court which limited bar admission to state residents.

The Court, in *Supreme Court of New Hampshire v. Piper*, 53 U.S.L.W. 4238 (U.S. Mar. 5, 1985), held that a nonresident's interest in practicing law in a particular state is a "privilege" protected by the Privileges and Immunities Clause of the Constitution, which was intended to create a national economic union.

The Court stated that a state may discriminate against nonresidents only when the reasons for doing so are "substantial". In examining the reasons offered by New Hampshire for limiting bar admission to state residents, the Court found that none of the arguments offered met the test of "substantiality."

The case involved a Vermont resident, Kathryn Piper, who lived 400 yards from the New Hampshire border. In 1979 she applied to take the New Hampshire bar examination and submitted with her application a statement that she intended to become a New Hampshire resident. She was allowed to take the bar examination and passed. But she was notified that before she could be sworn in, she would have to establish a home address in New Hampshire. She requested an exception, but it was denied, and she subsequently initiated a suit.

Legal Assistance Materials Mailed

The following legal assistance materials were mailed to Army legal assistance offices on 5 April 1985:

A Uniform Reciprocal Enforcements of Support Act Laws Digest. This extensive work, produced by the Office of Child Support Enforcement, US Department of Health and Human Services, not only describes the URESA statute as enacted by every state and territory, it also discusses state case law decided under applicable provisions of the statute. It constitutes an invaluable resource for legal assistance attorneys, particularly those practicing overseas.

The US Office of Child Support Enforcement provided the Legal Assistance Branch with approximately 200 copies of this publication. Certain smaller AMC installations within AMC will not receive the publication. Attorneys performing legal assistance at these installations and other legal assistance offices which desire another copy may write to Mr. John Martin, US Office of Child Support Enforcement, Room 1010, 6110 Executive Boulevard, Rockville, MD 20852.

—A Guide To Immigration Benefits, published by the Immigration and Naturalization Service. This 1982 publication was initially distributed to all Army legal assistance offices in 1983. The Immigration and Naturalization Service has again provided us with sufficient bulk copies to provide one to each legal assistance office.

—A Manual For Citizenship, published by the Daughters of the American Revolution. DAR provided the Legal Assistance Branch with sufficient bulk copies free of charge to provide one copy to each legal assistance office. This publication is designed for those who wish to study for US citizenship. Legal assistance attorneys counselling clients in this area should be aware that this is a publication favored by most federal judges and immigration officials who conduct naturalizations. It contains a set of sample questions which are oftentimes very similar to the questions asked on actual naturalization examinations.

—LAMP Newsletter Number 22 and an additional copy of LAMP Newsletter Number 21. The American Bar Association's Standing Committee on Legal Assistance For Military Personnel provides bulk copies of its newsletter to the Legal Assistance Branch for worldwide distribution. LAMP Newsletter Number 21 was previously distributed in January 1985. Copies of the LAMP Newsletters are also distributed to all Judge Advocate Graduate Course and Basic Course students.

—A Consumer Handbook on Adjustable Rate Mortgages. Prepared by the Federal Reserve Board and the Federal Home Loan Bank Board in response to a request by the House Committee on Banking, Finance and Urban Affairs, this booklet is similar to the booklet described elsewhere in this section prepared by the Mortgage Bankers Association. The Federal Reserve Board provided sufficient bulk copies of this publication to send to all legal assistance offices.

Cumulative Listing of Legal Assistance Materials Distributed

Following is a cumulative list of all publications and materials distributed by the Legal Assistance Branch to our worldwide mailing list beginning with December 1984. The list will be updated periodically and published in *The Army Lawyer*. For TJAGSA-produced materials, the printing budget permits us to mail only one copy of each publication to offices on the mailing list. Offices which would like additional copies, however, may order them from the Defense Technical Information Center. See the section entitled "Current Material of Interest," published elsewhere in this issue.

Item	*Source*	*Distribution Date*
All States Guide To State Notarial Laws	TJAGSA	December 1984
LAMP Newsletter Number 20	ABA	December 1984
Handbook On Child Support Enforcement (Pamphlet)	US Dep't HHS	December 1984
All States Income Tax Guide	Air Force	January 1985

Legal Assistance Officer's Federal Income Tax Guide	TJAGSA	January 1985	DAR Manual For Citizenship	DAR	April 1985
LAMP Newsletter Number 21	ABA	January 1985	Consumer Handbook On Adjustable Rate Mortgages	FRB	April 1985
URESA Laws Digest	US Dep't HHS	April 1985	LAMP Newsletter Number 22	ABA	April 1985
Guide to Immigration Benefits	US Dep't INS	April 1985			

Enlisted Update

Sergeant Major Walt Cybart

WO/SNCO Workshop

The Third Annual Warrant Officer/Senior NCO Workshop was held at the legal Specialist's School, Indian Creek, Indianapolis, from 18 to 22 February 1985. Thirty warrant officers and senior NCOs attended. Committees reviewed and revised task structure analysis for the 71D/71E soldier's manuals in the following areas: criminal justice, correspondence, library, eliminations, legal assistance, claims, and court reporters. Also, committees were appointed to make recommendations on the subject matter for the 71D/71E Basic Technical Course and to develop a proponent briefing to be used for DA promotion selection boards.

It was a very productive workshop with excellent participation by all attendees. We intend to have an annual review of the soldier's manual and SQT tests to ensure continued test material integrity.

5th Annual Refresher Training Course

The 5th Annual Refresher Course was conducted from 10 to 13 March 1985 at the US Military Academy, West Point, New York. The course was attended by over 150 legal specialists and court reporters, including over 30 Reserve and National Guard personnel.

Following the opening remarks by Major General Hugh J. Clausen, The Judge Advocate General, instruction was provided in the areas of office management, criminal law, court reporter school changes, legal specialist course changes, the US Army Reserve Program, office automation, claims, and MCM/AR 27-10 changes. The course for 1986 will be in March at Ford Ord, CA. Plan now to attend.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National

Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7100, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JATT.

June 17-28: JAOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

August 1985

1-2: PLI, Anatomy of an Automobile Trial, New York, NY.

1-2: PLI, Antitrust Law Institute, Chicago, IL.

4-9: NJC, Criminal Law—Graduate, Reno, NV.

4-9: NJC, The Judge & the Trial—Graduate, Reno, NV.

5-9: SBT, Advanced Criminal Law, Fort Worth, TX.

5-9: ALIABA, Bankruptcy Code Reexamined & Updated, Malibu, CA.

8-9: PLI, Introduction to Qualified Pension & Profit-Sharing Plans, Chicago, IL.

18-23: AAJC, Law of Evidence, Palo Alto, CA.

19-23: SBT, Advanced Family Law, Dallas, TX.

19-23: FPI, Skills of Contract Administration, Vail, CO.

20-21: PLI, Antitrust Law Institute, Chicago, IL.

22-23: PLI, Anatomy of an Automobile Trial, Chicago, IL.

22-24: PLI, Product Liability of Manufacturers, San Francisco, CA.

26-29: NCBF, Practical Skills Course, Raleigh, NC.

29-30: PLI, Introduction to Qualified Pension & Profit-Sharing Plans, Los Angeles, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the April 1985 issue of *The American Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually

Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center (DTIC)

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letter AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
ADB086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/JAGS-ADC-84-2 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-84-3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-84-4 (180 pgs).
AD B086937	Criminal Law, Evidence/JAGS-ADC-84-5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/JAGS-ADC-84-6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).
AD B090375	Contract Law, Contract Law Deskbook Vol 1/JAGS-ADK-85-1 (200 pgs).
AD B090376	Contract Law, Contract Law Deskbook Vol. 2/JAGS-ADK-85-2 (175 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/JAGS-ADA-85-1 (129 pgs).
AD B077738	All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B089092	All-States Guide to State Notorial Laws/JAGS-ADA-85-2 (56 pgs).
AD B087847	Claims Programmed Text/JAGS-ADA-84-4 (119 pgs).
AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
AD B087774	Government Information Practices/JAGS-ADA-84-8 (301 pgs).
AD B087746	Law of Military Installations/JAGS-ADA-84-9 (268 pgs).
AD B087850	Defensive Federal Litigation/JAGS-ADA-84-9 (268 pgs).

AD B087845	Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations JAGS-ADA-84-12 (321 pgs).
AD B087745	Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).
AD B086999	Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	Title	Change	Date
AR 27-20	Claims	I01	4 Mar 85
AR 190-5	Motor Vehicle Traffic Supervision	I05	8 Feb 85
AR 190-40	Serious Incident Report	I03	11 Feb 85
AR 190-47	U.S. Army Correctional System	I05	15 Feb 85
AR 340-15	Preparing and Managing Correspondence		1 Mar 85
AR 340-17	Office Management: Release of Information and Records from Army Files	I02	11 Mar 85
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program	I08	4 Feb 85
AR 612-2	Preparation of Replacements for Oversea Movement (POR)		28 Feb 85
UPDATE 4-3	Morale, Welfare and Recreation Update		20 Feb 85
DA Pam 360-503	Voting Assistance Guide		1984/85
DA Pam 550-150	El Salvador—A Country Study		1984

3. Articles

Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 Judicature 221 (1985).

Coyle, *Discovery of Military Aircraft Accident Investigation Reports*, 49 J. Air L. & Com. 827 (1984).

Cruden & Lederer, *The First Amendment and Military Installations*, 1984 Det. C.L. Rev. 845 (1984).

Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem*, 29 N.Y.L. Sch. L. Rev. 407 (1984).

Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429 (1984).

Hollander, *An Introduction To Legal and Ethical Issues Relating to Computers in Higher Education*, 11 J.C. & U.L. 215 (1984).

Moynihan, *International Law and International Order*, 1984 C.L. Rev. 877 (1984).

Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044 (1984).

Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. Mar. L. Rev. 1 (1984).

Sterchi & Sheppard, *Defendant's Right To Secure Medical Information and Records Concerning Plaintiff*, 53 UMKC L. Rev. 46 (1984).

Stillabower & Phillips, *Income Exclusion and Tax Treaty Applications to Earnings of U.S. Citizens Aboard*, 10 Int'l Tax J. 445 (1984).

Van Patten & Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 Hastings L.J. 891 (1984).

Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 Denver J. Int'l L. & Policy 1 (1983).

Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 68 Marq. L. Rev. 130 (1981).

Comment, *Strict Product Liability Suits for Design Defects in Military Products: All the King's Men; All the King's Privileges?*, 10 U. Dayton L. Rev. 117 (1984).

Note, *The Right of Self-Representation in the Capital Case*, 85 Columbia L.J. 130 (1985).

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 24 Int'l Legal Materials 38 (1985).

The Duty to Obey the Law, 18 Ga. L. Rev. 727 (1984).

The Role of Unions in the 1980's, 52 Fordham L. Rev. 1061 (1984).

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

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The Adjutant General

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